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NORTH CAROLINA REPORTS.

VOL. 148.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

SPRING AND FALL TERMS, 1908.

(IN PART.)

BY

ROBERT C. STRONG,

STATE REPORTER.

RALEIGH:
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SPRING AND FALL TERMS, 1908.

(IN PART.)

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†J. D. Murphey was appointed August 18, 1908, to fill out the unexpired term caused by the death of Judge Moore, and was succeeded by Joseph S. Adams.

SOLICITORS.

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CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1909.

SUPREME COURT.

The Supreme Court of North Carolina meets in the City of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1909.	
First District	February	1
Second District	February	8
Third District	February	15
Fourth District	February	22
Fifth District	March	1
Sixth District	March	8
Seventh District	March	15
Eighth District	March	22
Ninth District	March	29
Tenth District	April	5
Eleventh District	April	12
Twelfth District	April	19
Thirteenth District	April	26
Fourteenth District	May	3
Fifteenth District	May	10
Sixteenth District	May	17

SUPERIOR COURTS.

The 149th Report, now in press, will contain a court calendar for the terms of the Superior Courts for the fall of 1909.

The calendar for the Spring Term, 1909, was printed in the 147th. While the Acts of 1909 have not yet been printed, the following changes will be noted in the time of holding courts with a reasonable degree of certainty:

FIRST JUDICIAL DISTRICT.—Dare, May 1 (1).

FIFTH JUDICIAL DISTRICT.—Sampson, April 26 (3); *June 28 (1); Lenoir, †June 14 (2).

SIXTH JUDICIAL DISTRICT.—Johnston, †March 10 (1); Wayne, May 10 (2).

EIGHTH JUDICIAL DISTRICT.—Chatham, May 3 (1); Lee, March 29; †Moore, May 17 (1); Richmond, †April 5 (1); †May 24 (1); Scotland, †April 26 (1); *June 7 (1).

ELEVENTH JUDICIAL DISTRICT.—Forsyth, *May 17 (1); †May 24 (1); Stokes, *May 3 (1); †May 10 (1).

THIRTEENTH JUDICIAL DISTRICT.—Caldwell, May 17.

*For criminal cases only.
†For civil cases only.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT.

Terms.—Raleigh, fourth Monday after the fourth Monday in April and October. H. L. Grant, Clerk; George L. Tonnoffski, Deputy Clerk.

Wilmington, second Monday after the fourth Monday in April and October. Samuel P. Collier, Clerk; James K. Collier, Deputy Clerk.

New Bern, fourth Monday in April and October. George Green, Clerk.

Elizabeth City, second Monday in April and October. Thomas J. Markham, Clerk.

Washington, third Monday in April and October. H. L. Grant, Clerk; George L. Tonnoffski, Deputy Clerk.

OFFICERS.

Harry Skinner, United States District Attorney, Greenville, N. C.
J. A. Giles, Assistant United States District Attorney, Durham.
Claudius Dockery, United States Marshal, Raleigh.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.
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George L. Tonnoffski, Raleigh, Deputy Clerk.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at the same time and place, as follows:

Greensboro, first Monday in April and October. Samuel L. Trogden, Clerk.

Statesville, third Monday in April and October. H. C. Cowles, Clerk.

Asheville, first Monday in May and November. W. S. Hyams, Clerk.

Charlotte, second Monday in June and December. H. C. Cowles, Clerk.

OFFICERS.

A. E. Holton, United States District Attorney, Winston.
A. L. Coble, Assistant United States District Attorney, Statesville.
J. M. Milliken, United States Marshal, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

SPRING TERM, 1908.

JAY WOODS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 20 May, 1908.)

1. **Telegraph—Negligence—Messages, Delay in Delivery of—Prima Facie Case—Burden of Proof.**

When the failure of a telegraph company to deliver a message is shown, a *prima facie* case of liability is made out, and the burden of proof is upon the company to show facts excusing its failure.

2. **Same—Duty of Company—Evidence—Nonsuit.**

Upon plaintiff's evidence, tending to show that a telegram was addressed to No. 38 D. Street, where it could not have been delivered, and when the addressee lived in the rear of No. 83 D. Street, where delivery could have been made, and defendant introduced no evidence, it was error in the trial Judge to sustain a motion as of nonsuit upon the evidence, as it then was encumbent upon the defendant to show such reasonable inquiry and the exercise of that degree of care required of it under the circumstances to excuse the failure to deliver.

3. **Telegraph—Negligence—Message—Wrong Address—Delivery—Reasonable Efforts—Evidence—Idem Sonans.**

When a telegram was addressed to the wrong street number, where it could not have been delivered, it was encumbent upon the defendant to use such reasonable efforts to deliver it as required when no number is given; and the city directory containing the name of addressee, of Jay Wood for Jay Woods, with his correct address, it is sufficient evidence of negligence for the jury to consider.

4. Same—"Service" Message—"Better Address."

When the addressee of a message cannot, after due search, be found at the terminal point, a failure of the telegraph company to wire the sending office for a better address is some evidence of its negligence.

5. Telegraph—Death Message—Defense—Seeing the Body.

It is not sufficient to bar a recovery for actual damages for failure of a telegraph company to deliver a message announcing a death that the party for whose benefit it was sent saw the body before burial.

6. Telegraph—Common-law Duty—Statutes of Another State—Evidence—Judicial Notice.

An action against a telegraph company for mental anguish caused by its failure in its duty to deliver a telegram is founded on the common law, and does not require the aid of a contract to support it. Hence, as there is a presumption that, *prima facie*, the common law applicable to such cases is in force in other States, it is encumbent upon the party relying upon a statutory different rule of law applicable in another State to prove it, for the court will not take judicial notice thereof.

7. Telegraph — Death Message, Delay in Delivery of — Decomposition—Measure of Damages.

In an action upon a message announcing a death, when the complaining party arrived in time to see the body, damages will not be awarded for injury to feelings caused by seeing the corpse in an advanced stage of decomposition as a natural consequence of a breach of duty by the telegraph company in not delivering the message more promptly.

CLARK, C. J., concurring *arguendo*.

ACTION tried before *Guion, J.*, and a jury, at September Term, 1907, of BUNCOMBE.

This action was brought to recover damages for negligently failing to deliver a telegram. Grant Woods died in Knoxville, Tenn., 14 October, 1905, and immediately after his death his widow, Leona Woods, delivered to the defendant for transmission over its wires to the plaintiff, the brother of the deceased, who resided at Asheville, N. C., the following message:

"JAY WOODS, "KNOXVILLE, TENN., Oct. 14, 1905.
No. 38 Depot Street,
Asheville, N. C.

"Come at once. Grant Woods is dead. If not, let know.
"LEONA WOODS."

The plaintiff testified in his own behalf as follows: "My name is Jay Woods. I live in Asheville and own my own home, in the rear of No. 83 Depot Street, where I have lived for about ten years. I am a porter, in the employ of the Southern Railway Company, and on the 14th day of October, 1905, and before and after that time, was running on a passenger train between Asheville, N. C., and Columbia, S. C. My run brought me into Asheville between 1 and 2 o'clock on one day and took me out about 4 o'clock on the following day. I was in Asheville on Saturday, the day the telegram was received at the Asheville office, and until about 4 o'clock on the following day, when I went out on my run. Monday, on my way back to Asheville, I learned at Spartanburg, about 11 A. M., that my brother, Grant Woods, was dead, and that his body had passed through Asheville that morning and would be buried at Cleveland, N. C., that day. My brother lived at Knoxville and was engaged in railroading. Our mother's home is near Cleveland, and Grant's body was taken there from Knoxville for burial. My train was late that day, Monday, getting into Asheville so late that, as we came into the yard, No. 12, the train for Cleveland, was pulling out. The next train for Cleveland was Tuesday morning, about 7 o'clock. I took this train. On arriving at Asheville Monday afternoon, and finding I could not go to Cleveland until next morning, I wired my mother's home, asking that they hold the body until I arrived. I reached home some time after noon Tuesday, and walked to my mother's home, about five miles in the country, arriving about 4 o'clock. Grant's funeral was held about an hour after my arrival, and I was

present at his funeral. When I reached home the condition of Grant's body was such that I could hardly tell who he was. If the telegram had been delivered to me Saturday night, when it was received at the Asheville office, I could and would have caught the train for Knoxville, due to leave that night about 1:10 A. M. and to arrive at Knoxville about daylight Sunday morning. If I had missed this train there were two trains on the following day—one about 7 A. M. and one about 2:30 P. M.—from Asheville for Knoxville. My house is about 75 or 100 feet in the rear of Depot Street. There was one house between my house and Depot Street. There was no house fronting on Depot Street numbered 83, and a person walking along the street could not have seen such a number. I did not live at 38 Depot Street, and a message addressed to that number and delivered there would not have reached me, as there was a white family living there."

Will Robertson, witness for the plaintiff, testified that on 15 October, 1905, he resided in the rear of No. 85 Depot Street, and that the above message was delivered to him on Sunday, about 6 o'clock P. M., and by him turned over to Jay Woods' wife later in the evening.

The plaintiff also offered in evidence the then current city directory of Asheville. It was admitted that this was the city directory, but defendant did not admit that it was correct. The directory showed the name of Jay Wood, porter, and that he lived in the rear of house No. 83 Depot Street.

At the close of plaintiff's evidence the court, on motion of defendant's counsel, ordered a nonsuit, under the provisions of the statute. Plaintiff excepted and appealed.

Frank Carter and *H. C. Chedester* for plaintiff.
Merrick & Barnard for defendant.

WALKER, J. The case should have been submitted to the jury, and the court erred in deciding as matter of law that there was no evidence of actionable negligence. The defend-

ant introduced no evidence, and it therefore does not appear that it made any effort, not even the slightest, to deliver the message, notwithstanding the mistake in the street address. This Court, in *Hendricks v. Telegraph Co.*, 126 N. C., 304, held it as well settled by the authorities that when a telegraph company receives a message for delivery to the addressee and fails to deliver it, it becomes *prima facie* liable, and the burden rests upon it of proving such facts as will excuse its failure. That case followed the principle as stated in *Sherrill v. Telegraph Co.*, 116 N. C., 655, and it has been since approved in numerous cases. *Laudie v. Telegraph Co.*, 126 N. C., 431; *Rosser v. Telegraph Co.*, 130 N. C., 251, and *Cogdell v. Telegraph Co.*, 135 N. C., 431, where the cases upon this question are collected. The Court said, in *Rosser v. Telegraph Co., supra,* that "All the facts relating to the transmission of the message were within the possession of the defendant, and it did not choose to disclose them to the court and jury. From the very nature of telegraphy, neither the sender nor sendee could personally know what became of the message or why it was not received at its destination, or, if received, why not delivered."

In *Hinson v. Telegraph Co.*, 132 N. C., 460, the message was addressed to M. L. Hinson, in care of the Olympia Mills, Columbia, S. C., without giving any street number or address. The messenger was informed that Hinson was not at the mills. The agent of the mills refused to receive it for him, and this Court said that the case stood as if the message had not been sent in care of the mills, and with no better information of the whereabouts of Hinson than if it had simply been addressed to him at the city of Columbia, S. C. It was nevertheless held to be the duty of the defendant to make every reasonable effort and to exercise due diligence to find the sendee and to deliver the message, and this is the doctrine as stated in all the decisions of this Court where such a point has been presented. *Cogdell v. Telegraph Co., supra;*

Hendricks v. Telegraph Co., supra. In *Hinson's case* the defendant, as it appeared, had used due diligence to find the addressee. But the case of *Lyne v. Telegraph Co.,* 123 N. C., 129, would seem to be directly in point and to charge the defendant with negligence, at least *prima facie*, as the facts now appear in this case. It was there held to be the duty of the defendant to inquire at the post-office for the residence of the sendee, no street address having been given. The rule is that the defendant must make reasonable inquiry and exercise that degree of care which a prudent person would use under the circumstances in the effort to deliver the message. In this case it seems that the defendant made no attempt to deliver the message. The misdirection did not excuse this omission on its part. If the messenger boy had inquired at No. 38 Depot Street he would have been told, it is true, that Jay Woods did not live there, but he might have acquired information which would have led to the discovery of his residence, as he lived close by. The entry in the city directory was also some evidence to be submitted to the jury upon the issue of negligence. The slight variation from the true name—that is, Jay Wood for Jay Woods—was not sufficient to deprive it of its character as evidence, and was hardly sufficient to mislead a person of ordinary prudence. *Cogdell v. Telegraph Co., supra.* No inquiry was made at the post-office. *Lyne v. Telegraph Co., supra.* Indeed, the defendant, so far as the case shows, did not even send out a messenger boy with the telegram for the purpose of finding the sendee. If due search had been made for him and he could not be found, it was still required to wire back for a better address, which it did not do, and this was evidence of negligence. *Hendricks v. Telegraph Co.,* 126 N. C., 304; *Cogdell v. Telegraph Co.,* 135 N. C., 431. In any view of the case there was evidence of negligence proper to be considered and passed upon by the jury, and the judgment of nonsuit was therefore erroneous.

The fact that the plaintiff did see his brother's body before the burial is no defense to this action. The defendant has failed to perform a plain duty which it owed to him, and this shows actionable negligence. *Hendricks v. Telegraph Co., supra; Cogdell v. Telegraph Co., supra; Hocutt v. Telegraph Co.,* 147 N. C., 186. Nor will the objection hold that the message was sent from Knoxville, Tenn. There is no proof of the law of that State in respect to the recovery of damages for mental anguish in a case like this one. We have held that the breach of the duty of the defendant in delivering a message is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it. *Green v. Telegraph Co.,* 136 N. C., at p. 492; *Cashion v. Telegraph Co.,* 124 N. C., 459; *Cogdell v. Telegraph Co.,* 135 N. C., 431. "In the absence of proof to the contrary, the courts of our State will presume the common law to prevail in a sister State." 6 Am. and Eng. Enc. of Law (2d Ed.), 282; *Griffin v. Carter,* 40 N. C., 413; *Brown v. Pratt,* 56 N. C., 202; *Gooch v. Faucett,* 122 N. C., 270; *Terry v. Robbins,* 128 N. C., 140; *Bank v. Carr,* 130 N. C., 479. "The statute and common law of our sister States are facts to be proven, as any other facts in a cause, by the party who seeks to take advantage of any difference that may exist between such laws and our own." *Bremhill v. Van Campen,* 8 Minn., 13; *Peterson v. Bank,* 32 N. Y., 21. The rule upon this subject is well expressed in *Carpenter v. Railway,* 72 Me., 388: "This brings us to the inquiry whether the ruling at the trial can be sustained upon the ground that there was no evidence of what the law of Canada was. We think not. Undoubtedly the case was to be tried in accordance with the law of this State, in the absence of proof of any other law. 'It is a well-settled rule,' says the Court of Appeals of New York, 'founded on reason and authority, that the *lex fori,* or, in other words, the laws of the country to whose courts a party appeals for redress, furnishes in all cases

prima facie the rule of decision; and if either party wants the benefit of a different rule or law (as, for instance, the *lex domicilii, lex loci contractus,* or *lex loci rei sitæ*), he must aver and prove it. The courts of a country are presumed to be acquainted with their own laws, but those of other countries are to be averred and proven, like other facts of which courts do not take judicial notice.'" *Monroe v. Douglas,* 5 N. Y., 447. Wigmore, in his work on Evidence, par. 2536, says that in reality there is no presumption of what the law is in another State, but the true process is merely that of refusing to recognize a presumption that a foreign State has a law different from that of the *lex fori.*

The plaintiff cannot recover any damages because he saw his brother's body after decomposition had advanced so far that his features could "hardly" be recognized. We have held at this term that this is not a proper element of damages. *Kyles v. Railway,* 147 N. C., 394.

New Trial.

CLARK, C. J., concurs in the opinion of the Court on the additional ground thus stated in the two latest works on the subject:

Jones Telegraph, sec. 598, says: "Under the rulings of the courts in those States which permit a recovery of damages for mental anguish or suffering, such damages may be recovered for the negligent transmission or delivery of a message sent into these States from those which refuse to allow such damages. *Gray v. Telegraph Co.*, 108 Tenn., 39; 56 L. R. A., 301n; 91 Am. St., 706; *Telegraph Co. v. Blake,* 29 Tex. Civ. App., 224. The same rule applies where the messages are sent from the States which permit to those which do not permit such recovery, when the action is brought in the former States. So, also, damages may be recovered in the State where the message is sent, although it is to be delivered in a State which does not allow a recovery of such damages.

Bryan v. Telegraph Co., 133 N. C., 603; *Telegraph Co. v. Waller*, 96 Tex., 589; *Telegraph Co. v. Cooper*, 29 Tex. Civ. Appeals, 591. But if both the States from and to which the message is sent refuse to allow damages for mental suffering, such damages cannot be recovered, although the suit is brought in a State which does allow such damages, and is one through which the company has a line. *Thomas v. Telegraph Co.*, 25 Tex. Civ. Appeals, 398. It seems that the statutes in those States (and, we may add, decisions) permitting a recovery of such damages raise the duty of these companies above that assumed in the contract of sending, and base their reasons upon the fact that a public duty has been violated, for which damages may be recovered, either at the place of sending or receiving," citing to sustain the view that this is a breach of public duty Thomp. Elec., sec. 427. This ground of recovery has always been recognized in this State.

In 2 Joyce Telegraph, sec. 812c, it is said: "Under a South Carolina case, if a mistake occurs at the office in a State from which the telegram is sent, recovery may be had therein by the addressee for mental anguish, where it is a ground for recovery in such State, and it need not be shown that there has been a change in the common law of the State to which the message is sent. *Walker v. Telegraph Co.*, 75 S. C., 512. It is also determined in that State that, although the telegram was received for transmission in another State, yet, if there was a failure to deliver in South Carolina, an action was maintainable there for the resulting mental suffering."

If there is breach of a public duty, and damages for mental anguish are recoverable therefor, it logically follows that when the action is brought in this State such damages are recoverable, whether the message originated or was received here. And, for the very reason that permits either the sender, sendee or beneficiary of a message to recover upon showing injury to himself from a breach of such duty, this State has allowed damages for mental suffering, irrespective of whether

the message originated here or was received here. In *Thompson v. Telegraph Co.,* 107 N. C., 449, such damages were allowed where the message was sent from Danville, Va., to Milton, N. C. In *Young v. Telegraph Co.,* 107 N. C., 370, the message was sent from Greenville, S. C., to New Bern, N. C. These were our two earliest cases allowing damages for mental anguish. And such damages have been frequently allowed since in regard to telegrams originating elsewhere. The sole case to the contrary is *Johnson v. Telegraph Co.,* 144 N. C., 410, in which the first paragraph in the headnotes requires us to overrule the second headnote.

M. E. COZAD ET AL. v. H. M. McADEN.

(Filed 25 May, 1908.)

1. **Deeds and Conveyances—Probate, Time for, Not Limited.**

   A deed duly executed prior to January, 1889, can be admitted to probate, under chapter 147, Laws 1885 (now Revisal, sec. 980), as no limitation of time for registration is therein specified.

2. **Deeds and Conveyances—Execution Prior to 1886—Registration 1893—Statute Applicable.**

   A deed executed prior to 1 January, 1886, and offered for probate and registration in April, 1893, is governed in that respect by The Code, sec. 1250.

3. **Deeds and Conveyances — Probate Without Adjudication Defective.**

   The probate of a deed is defective, under The Code, sec. 1250, which lacks the adjudication therein required, that it had been duly acknowledged or proven.

4. **Deeds and Conveyances — Certificate of Commissioner—Revisal, ch. 37—Requirements of Registration.**

   A deed registered in the proper county upon the certificate of a commissioner of deeds from another State must have the *fiat* from the clerk ordering it to be registered, or the registration will be invalid, under Revised Code, ch. 37, sec. 5. This defect is not cured by Revisal, sec. 1022.

COZAD *v.* MCADEN.

ACTION tried before *Guion, J.*, and a jury, at Spring Term, 1908, of GRAHAM.

Plaintiffs appealed.

Zebulon Weaver, F. S. Johnson and *T. A. Morphew* for plaintiffs.

Dillard & Bell, Merrick & Barnard and *Tillett & Guthrie* for defendant.

CLARK, C. J. This is an action to remove a cloud upon title. Neither party was in possession. To complete plaintiff's chain of title from the State he offered the following deeds, which being excluded, he took a nonsuit and appealed:

The first deed, from Herbert to Hineman, purported to have been acknowledged before a commissioner of deeds for North Carolina in Ohio, in Cincinnati, 1 February, 1867, and the other, from Hineman to Stephenson, purported to have been executed 2 March, 1868. Both were probated and recorded in Graham County, where the land lies, on 17 April, 1893. The defendant objected that the probate was defective, and because the deed could not be legally admitted to probate and registration in 1893, having been executed prior to 1 January, 1886.

The second objection was invalid. Chapter 147, Laws 1885, now Revisal, sec. 980, contains no limitation as to the time when the conveyance shall be registered. It simply provides that it shall not be valid against creditors or purchasers for value, except *from the registration thereof. Hallyburton v. Slagle,* 130 N. C., 484.

But the first objection must be sustained. The probate as to the first deed is simply that the certificate of the commissioner of deeds is adjudged to be correct. This does not comply with the statute in force in 1893 (The Code, sec. 1250), which required that the clerk "shall adjudge such deed or other instrument to be duly acknowledged or proved."

Revisal, sec. 999, provides that the clerk shall adjudge the instrument to have been duly proven, and that the certificate is in due form; but Revisal, sec. 1001 (act of 1899), now provides that the form of the clerk's probate shall be sufficient if the certificate is "adjudged to be correct." This 1893 probate is governed by The Code, sec. 1250, above quoted. Up to C. C. P., sec. 429 (24 August, 1868), the statute merely required "an order for registration." *Johnson v. Lumber Co.*, 147 N. C., 249. Section 429, C. C. P., required an adjudication, but a curative statute was enacted making probates in the previous manner valid up to 27 January, 1870. Laws 1869-'70, ch. 32.

The probate of the second deed (of 2 March, 1868) by the Clerk of Graham Superior Court, also made 17 April, 1893, was defective for the same reason, that it lacked the adjudication that it had been duly proven, required by The Code, sec. 1250.

The plaintiff then offered a certified copy of the deed of 1 February, 1867 (Herbert to Hineman), from the Register of Deeds of Cherokee County (in which the land lay in 1869), showing that it had been registered in that county 30 September, 1869, but this was properly rejected, there being no order of registration from the Clerk. The endorsement was simply, "The foregoing deed came to hand 30 September, 1869, and was then duly registered," etc., giving book and page, and signed by the Register. The invalidity of such registration upon the certificate of the commissioner of deeds, without an adjudication of the clerk, is decided. *Evans v. Etheridge* 99 N. C., 43. It is true that at that time the statute did not require the probate to be registered (*Perry v. Bragg*, 111 N. C., 163; *Cochrane v. Improvement Co.*, 127 N. C., 386), if there was in fact a proper probate that could be shown. But it was indispensable that there should at least be a *fiat* from the clerk ordering the deed to be registered. Revised Code, ch. 37, sec. 5.

The nullity of registration without authority is too well settled to need discussion. *Todd v. Outlaw,* 79 N. C., 235, and numerous cases therein cited, as well as those since, which have approved and followed it, which last will be found in the annotated edition of 79 N. C.

There have been very many curative statutes (Revisal, secs. 1008 to 1030, and two in the Laws of 1907, since the Revisal), embracing almost all such defects, but they have omitted to cure this particular defect. Revisal, sec. 1022, fails to include commissioner of deeds, else it would have been sufficient.

Affirmed.

J. M. SYKES ET AL. V. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 25 May, 1908.)

1. **Insurance—False Representations—Reformation of Contract.**

Courts of equity will reform a written contract of life insurance in accordance with the representations made by the agents of the insurance company, which are false and fraudulent, relied on by the insured, and reasonably induced him, an illiterate man, to accept it as the one he thereby supposed it to be.

2. **Same—Measure of Damages.**

When it is established by the verdict of the jury, upon competent evidence and under proper instructions from the court, that the insured was induced to accept a contract of insurance different from what he supposed it to be by false representations of the agents of the insurance company, to the effect that he or the beneficiaries under the policy might withdraw the full amount of premiums paid, with interest, the measure of damages is the full amount of premiums paid, with interest thereon in accordance with that established by the contract as reformed; and it was error in the court below in this instance to allow the legal rate of six per cent. instead of four per cent., as stated in the policy.

ACTION tried before *Ferguson, J.,* and a jury, at October Term, 1907, of MECKLENBURG.

This action was brought to recover the amount of the premiums paid by the male plaintiff to the defendant on certain insurance policies described in the pleadings. The plaintiffs alleged that on or about 16 March, 1896, the defendant, through its officers and agents, came to plaintiff and importuned plaintiff to take out certain policies of insurance. This proposition was refused by plaintiff, who assured said officers and agents that he knew little of the nature of such contracts of insurance, and that said plaintiff did not have the means to lay out in such contracts, and upon this refusal the defendant, through its officers and agents as aforesaid, assured the plaintiff that they could and would issue to plaintiff insurance policies upon the life of himself and family, the premiums to be paid at the rate of so much per week, payable weekly, upon and with the condition, therein stipulated and set out, that upon the expiration of ten years the plaintiff or other person or persons entitled as beneficiaries under said policies could and might withdraw the full face of the policies and discontinue the policies or contracts of insurance without payment of any further sum, or that plaintiff or the beneficiaries might elect to draw from said defendant the aggregate of all premiums paid in, together with interest thereon, if they preferred, and cancel the policies. And the said defendant, through said officers and agents, assured plaintiff over and over again that these contracts embodied and would give to plaintiff all the advantages of a savings bank, with the additional advantage of the protection of insurance in the event of death, and that said contracts or policies would fully, by their terms, give plaintiff the said benefits. And plaintiff, relying upon said assurances as true, agreed to take out upon said conditions policies or contracts of insurance as follows: one policy on the life of plaintiff, face value $112, No. 528177; one policy on the life of plaintiff's wife, Maggie R. Sykes, face value $72, No. 528178; one policy on the life of Carl Sykes (plaintiff's son), No. 528179; one policy on the

life of Maggie R. Sykes, No. 642947. And plaintiff agreed to pay therefor, and has paid regularly therefor since said date, a weekly premium of 25 cents, amounting in all to $150. That plaintiff accepted the policies above named upon the assurance of defendant that they in terms guaranteed the benefits and protection as hereinbefore set out, and said plaintiff has faithfully met every assessment called for under the provisions of the above-named contracts of insurance, and has paid the defendant in doing so the aggregate principal sum of about $150. All these amounts plaintiff has paid and was induced to pay by assurances of defendant, upon which plaintiff implicitly relied, that plaintiff or other beneficiaries under said contract, at the end of ten years, might withdraw in cash the full face of the policies or the full amount of premiums paid in, with interest thereon. That plaintiff is of humble station in life, of limited knowledge of affairs, and almost entirely ignorant of insurance contracts; plaintiff never for himself read said contracts, and would not know, perhaps, if he had read the same, what benefits are guaranteed and provided under their terms; but said plaintiff relied upon the assurances of defendant's officers and agents, who made a pretense of reading and explaining said contract to plaintiff, and in doing so the defendant, through its officers and agents, unlawfully and wickedly misread and falsely stated what was in the contracts, with a design to inveigle this plaintiff into accepting these contracts, fraudulently misrepresenting the terms of the same, as hereinbefore set out; and that, moved by these statements, plaintiff believed in the honesty and integrity of the assurances, accepted the contracts in good faith and kept up said insurance for a long time, at great sacrifice, and paid therefor a large part of his weekly earnings to the defendant upon these contracts. Plaintiff has recently been informed, and so alleges, that the policies are not such as he contracted for; that they provide for no benefit, unless for a mere pittance, to the beneficiaries at the end of

ten years, and since the discovery of the same the plaintiff has demanded the return of his premiums so paid, and the same has been refused.

Plaintiff alleges that the statements made by the defendant, through its officers and agents, as above set out, were false, fraudulent and wickedly designed to deceive and calculated to deceive plaintiff, and that they did in fact deceive plaintiff; and that the said defendant has knowingly reaped the reward of this wrongful conduct, and that, instead of issuing contracts pursuant to and consistent with the agreements, it issued others, providing for no substantial benefits to the beneficiaries thereunder, except in the event of death, and that this wrongful conduct has caused the plaintiff damage in the sum of $200. Wherefore, plaintiff demands judgment for the sum of $200, for the costs of this action and for such other and further relief as to the court may seem just and right.

The defendant answered and denied the material allegations of the complaint.

The court submitted issues to the jury, which, with the answers thereto, are as follows:

1. "Did the defendant, through its agents, represent to plaintiff that it could and would issue to said plaintiff insurance policies on the lives of Joseph M. Sykes, Maggie R. Sykes and Carl Sykes, with the provision therein stipulated that at the end of ten years from the date thereof the plaintiff might withdraw the whole amount of premiums paid in, with four per cent. interest thereon?" Answer: "Yes."

2. "If so, were such representations false?" Answer: "Yes."

3. "If so, were such representations relied upon by the plaintiff?" Answer: "Yes."

4. "If so, was the plaintiff induced thereby to enter into said contracts of insurance?" Answer: "Yes."

5. "Has the plaintiff waived his right to rely upon said representations?" Answer: "No."

6. "What amount is the plaintiff entitled to recover of the defendant?" Answer: "One hundred and forty-four dollars and fourteen cents."

Upon the verdict the court adjudged that the plaintiff recover of the defendant the said sum of $144.14 and costs. The defendant excepted and appealed.

No counsel for plaintiffs.

W. B. Rodman and *Morrison & Whitlock* for defendant.

WALKER, J. The defendant entered several exceptions to the rulings and charge of the court, which we understood to be abandoned here, and, we think, properly so. The question which we are called upon to decide, and which was the only one presented in the argument before us, relates to the measure of damages. The court charged upon the sixth issue that, if the jury found the other issues in favor of the plaintiff, he was entitled to recover as damages "the amount of the premiums paid, with six per cent. interest from the date of each payment until paid." This instruction was erroneous—not sufficiently so, however, to reverse the judgment, but only to modify and affirm it, for the reasons which will hereinafter appear.

The defendant's counsel have argued that there was substantial error in the charge of the court upon the sixth issue, as the wrong rule for measuring the damages was given to the jury. They insist that the defendant was entitled to a deduction or credit to the extent of the value of the benefit received by the plaintiff in the way of insurance during the period fixed by the contract, this being an action sounding in tort and brought for the purpose of rescinding the contract because of the fraud or deceit practiced upon the plaintiff. We will state the proposition in the language of the defendant's counsel, to be found in their brief, so that there may be no misunderstanding as to the exact position taken by them:

"The proper rule as to the measure of damages is that laid down in *May v. Loomis,* 140 N. C., 350, namely, the defendant should be required to pay back what has been paid in, with interest, less the actual value of the property received, unless the property can be restored." That is the ordinary rule, perhaps, as stated in the case cited by counsel, and they attempt to draw an analogy between such a case and this one. In this case they say the plaintiff has received the ten years' insurance for which he contracted. This, of course, cannot be returned. Therefore, in order to have the parties placed *in statu quo,* or as near this as can be done, the plaintiff should be required to allow the defendant, as a credit upon the premiums which have been paid, the value of that (benefit) in insurance which he has received. It is also contended by the learned counsel that this case is essentially different from *Braswell v. Insurance Co.,* 75 N. C., 8, and other decisions of a like kind following it, by reason of the fact that in each of those cases the contract of insurance was an entire and indivisible one, and we presume it would be further argued, as a sequence from the premise, that the policy was wrongfully cancelled by the defendant before the term of insurance had expired, and the defendant, having thus refused to perform the entire contract, should restore what it had received without any abatement, because it was not entitled to have anything until all the contract was performed on its part. *Lawing v. Rintels,* 97 N. C., 350; *Tussey v. Owen,* 139 N. C., 457. But we do not think our decision should be rested on so narrow a ground, nor do we think this case bears any analogy to *May v. Loomis, supra; Smith v. Bolles,* 136 U. S., 125, and the other cases cited by counsel in their well-prepared brief to sustain their contention. It is certainly not like *Braswell v. Insurance Co.* and cases of its type, as counsel admit, but not altogether for the reason stated by them. In our case the representation was that the plaintiff would receive the benefit of the insurance

and, in addition, the premiums paid in and four per cent. interest thereon at the end of the insurance term; and, if we consider the action as one sounding in tort, it may be that the plaintiff could recover the premiums and interest without making any allowance for the benefit received from the insurance, and upon a principle not inconsistent with the doctrine as stated in either class of cases relied on by the defendant. It would seem that when a plaintiff sues to recover damages for deceit he should be recompensed in damages to the extent of placing him in as good a position as he would have occupied if the contract had been as represented. In *Heddon v. Griffen*, 136 Mass., at p. 232, where it appeared that a fraudulent representation had been made as to a policy of insurance, the Court said: "We are of the opinion that under the circumstances he (the plaintiff) has a right to recover damages of the defendant to an amount which will put him in the same position as if the fraud had not been practiced on him." Our case is stronger than this one, for there the contract was still executory, but here the full insurance period had elapsed. The plaintiff had received the insurance which it was represented he would receive, and is now suing for the balance due, if the defendant is required to make good its deceitful representation. But we have not decided this case upon any such ground, as we consider it very clear that the plaintiff has sufficiently alleged in the complaint, and the jury have found in their verdict upon the issues submitted to them, that he was fraudulently induced to enter into a contract of insurance, as evidenced by the policy, which he did not intend to make. We, therefore, have presented a case of one party who, by a mistake induced by the fraud of another, has executed a contract different from what it was supposed to be when the agent misled the plaintiff as to its true contents and meaning. This presents a case for equitable relief by a reformation of the contract, and an enforcement of it as thus corrected. A part of it has been carried out—that is, the

plaintiff's life has been insured for the stipulated time—while the other part, the payment of the premiums and interest, the defendant refused to perform. The court in such a case will compel a specific performance of the contract after conforming its terms to what they should have been. It is not always essential to the reformation of a contract that there should be a mutual mistake of the parties in draughting it. The mistake of one party induced by the fraud of the other is quite sufficient to entitle the defrauded party to the aid of a court of equity. This is elementary, and it would be strange if the law were otherwise. *Wilson v. Land Co.*, 77 N. C., 445. "The remedy of reformation is obviously one which is necessary to the complete and exact administration of justice, and which, moreover, can be attained by equitable procedure alone. A court of law may construe and enforce an instrument as it stands, or may refuse, upon proper cause shown, to give any effect to it, or may treat it as a nullity. But it is plain that, if the instrument has not been drawn so as to express the true intention of the parties, to enforce it in its existing condition would be simply to carry out the very mistake or fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. It is obvious, therefore, that the only true measure of justice in such a case is the equitable remedy by reformation (or correction, as it is sometimes called), by means of which the instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape. In like manner policies of insurance have been reformed where, through inadvertence, accident or mistake, the terms of the policy have not been properly set forth. And so, where, through artifice, the written evidence of a contract is drawn in such way that the terms of the agreement are not accurately expressed, the party injured by the fraud may come into equity for the purpose of having the instrument corrected and the contract, as reformed, enforced." Bisp-

ham's Equity (6th Ed.), sec. 486. That accurate and learned writer further says: "Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation. The case is, of course, different if any element of fraud exists; for it has been properly held that where there is a mistake on one side and fraud on the other there is a case for reformation." *Ib.*, sec. 469. "It has been asserted that, while fraud is a ground for rescission, it is not a ground for reformation, but the better rule is that fraud may be a ground for reformation, especially where it is accompanied by mistake, as where there is a mistake of one of the parties, accompanied by fraud on the part of the other." 24 Am. and Eng. Enc., p. 652b. The principle, as we have seen, applies to policies of insurance. "The power of reformation extends to practically every kind of written instrument. Thus, there may be a reformation of a conveyance, a mortgage or deed of trust, a bond, an insurance policy, a promissory note, lease, power of attorney, contract of sale, or any character of contract in writing." 24 Am. and Eng. Enc. (2d Ed.), p. 652. In *Thompson v. Insurance Co.*, 136 U. S., 287, a policy was reformed and payment of it enforced after the loss had occurred. In *Snell v. Insurance Co.*, 98 U. S., 88, it is said: "We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite, concluded agreement as to insurance, which in point of time preceded the preparation and delivery of the policy, is established by legal and exact evidence, which removes all doubt as to the understanding of the parties. In the attempt to reduce the contract to writing there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such

a case is, we think, well settled by the authorities." In *Henkle v. Royal Exchange*, 1 Ves. Sen., 318, the bill sought to reform a written policy after the loss had actually happened, upon the ground that it did not express the intent of the contracting parties. Lord Hardwick said: "No doubt but that this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that, if reduced to writing contrary to the intent of the parties, on proper proof, it would be rectified." So, in *Gillespie v. Moon*, 2 Johns (N. Y.) Ch., 585, *Chancellor Kent* examined the question, both upon principle and authority, and thus stated the doctrine: "I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against a deed or a contract in writing founded in mistake or fraud. The mistake may be shown by parol proof and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defense." In the same case he said: "It appears to be the steady language of the English Chancery Court for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show by parol proof a mistake as well as fraud in the execution of a deed or other writing." In *Hearne v. Insurance Co.*, 20 Wall., 490, *Justice Swayne* states the principle thus: "The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred." This Court decided, in *Floars v. Insurance Co.*, 144 N. C., 232, that in proper cases

courts of equity have jurisdiction to reform a contract of insurance, in order to enable the holder of the policy to recover, in accordance with a previous contract differing from the written one, when the difference was caused by fraud or mistake, and the court will award damages in the same suit if necessary to give full relief. We know that a money judgment is not an unusual form of relief in a court of equity. *Sprinkle v. Wellborn,* 140 N. C., 163. There was sufficient evidence to carry this case to the jury, and the charge of the court fairly presented to them the issues involved. *Caldwell v. Insurance Co.,* 140 N. C., 100. We have discussed the question relating to the reformation of the policy, so as to show that the defendant is not entitled to any credit for the benefit received from the insurance, for the reason that the plaintiff was entitled to that under the original oral contract, if it had been properly reduced to writing and it had not been falsely stated in the policy, by reason of the defendant's fraudulent conduct. He is also entitled to the premiums, with four per cent., instead of six per cent., as allowed by the court. The plaintiff recovers according to the reformed contract, and therefore can only have four per cent. interest on the premiums. The judgment will be modified in this particular, and is in other respects affirmed.

There was some evidence that the plaintiff was very ignorant and unlettered, and this must have been known to the defendant's agent. He was an easy mark for the false and fraudulent practices of the defendant's agent, who was evidently a man of much superior intelligence. There was some evidence to the contrary, but what was the fact in this conflict of testimony was a question for the jury. The agent, it seems, took advantage of the plaintiff's ignorance and misled him as to the true nature of the contract. The policy was so worded as to leave some room for doubt and uncertainty as to what or how much the plaintiff would receive at the end of the insurance period, and what the agent said in explana-

tion of it was fairly calculated to mislead an ignorant man. The jury, by their verdict, have substantially found that there was a mistake in writing the policy, which was induced by the fraud of the defendant. This entitled the plaintiff to the judgment, with the rate of interest changed. We think, under the circumstances, the costs of this Court should be taxed against the defendant.

Modified and Affirmed.

DELPHIA D. AUSTIN ET AL. V. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 25 May, 1908.)

For digest, see *Sykes v. Insurance Company*, next above.

ACTION tried before *Ferguson, J.*, and a jury, at October Term, 1907, of MECKLENBURG.

Defendant appealed.

No counsel for plaintiffs.

W. B. Rodman and *Morrison & Whitlock* for defendant.

WALKER, J. This case is in all material respects like *Sykes v. Insurance Co., ante*, 13, the only difference being that the plaintiff alleges in this case that it was represented that at the end of the insurance period, if the premiums had been regularly paid, she would be entitled to the face value of the policy without further payment of premiums, instead of the option to take the said amount or the total sum of all the premiums she had paid, with four per cent. interest, as in the other case. The principle governing the two cases being the same, and there being no question as to the rate of interest, as there was in the *Sykes case*, we declare that there was no error in the rulings and judgment of the court.

No Error.

STATE EX REL. J. L. BURKE v. J. W. M. JENKINS ET AL.

(Filed 25 May, 1908.)

1. **Cities and Towns—Powers of Commissioners—Quo Warranto.**
   Under Revisal, sec. 2917, "The corporate powers (of towns and cities) can be exercised only by the board of commissioners or in pursuance of resolutions adopted by them, unless otherwise provided by law," and the power of a town to remove a public officer for cause is one of the common-law incidents to all corporations.

2. **Same—Public Officer—Removal for Cause.**
   It is within the powers of the town commissioners to remove, upon notice, the town treasurer from office for disobeying their orders in paying certain indebtedness and not refunding when so paid.

3. **Same—Review by Courts.**
   When it is allowable for the town commissioners to remove the town treasurer for cause, the soundness of the cause is reviewable by the courts upon a *quo warranto*, but a trial by jury is not required.

4. **Quo Warranto—Judgment upon Pleadings—Demurrer.**
   When the Judge in the lower court renders judgment upon the pleadings restoring the relator in *quo warranto* to his office, the proceedings are in the nature of judgment upon demurrer, in which the allegations must be taken as true.

ACTION heard by *Webb, J.*, at November Term, 1907, of GASTON.

Defendants appealed.

Quo warranto brought by the relator to recover the office of Treasurer of the Town of Bessemer, from which the relator had been removed by the Board of Town Commissioners.

Upon the pleadings the Judge rendered judgment in favor of the relator, restoring him to office, giving judgment that he recover his fees, ordering a reference to ascertain the amount, and ousting the defendants. This is, therefore, in the nature of a judgment upon a demurrer to the answer, which must be taken as true.

It appears from the pleadings that Burke was elected treasurer of said town on 6 May, 1907. While the relator was

acting as treasurer he was forbidden by the commissioners to pay a certain claim against the town. In disregard of such order and in violation of his duty the relator paid the claim. The board thereupon, at its meeting, 2 June, 1907, ordered the relator to replace said sum in the treasury. At its meeting, 5 July, 1907, it appearing that this order also had been disregarded, he was again notified to replace the money, and a resolution was adopted that if he failed to refund the money to the town treasury his office would be declared vacant, and it was ordered that he be served with a copy. At a subsequent meeting of the board, 24 July, it appearing to the board that the relator had been served with a copy of said order and resolution, but had failed and refused to obey the order to refund the money, a resolution was adopted requesting him to resign and requiring the tax collector to pay over all collections to the chairman of the finance committee, a copy of which was served on the tax collector and the relator, and the latter's bond which had been tendered by him was rejected and returned to him, and the reasons recorded on the minutes of the board.

At the meeting of the board, 14 September, 1907, the following resolutions were adopted:

"Upon motion, unanimously carried, it was resolved and voted that, whereas J. L. Burke continues to treat this board with contempt and refuses to turn into the treasury of this town the $30 paid out against the positive instructions and vote of this board, duly assembled, when J. L. Burke was himself present; and whereas he has continuously refused to come before this board, though being repeatedly requested to do so; and whereas he claims that he has the right and authority to exercise his own discretion as to when and to whom money shall be paid, as the board has; and whereas this board has voted that J. L. Burke be suspended for the misappropriation of the moneys in question and for disobedience of the positive vote and order of the board: Now, therefore, be it

"*Resolved,* That the said J. L. Burke hereby be removed finally and fully as Treasurer of this town. J. W. M. Jenkins is hereby elected Treasurer of this town instead of J. L. Burke, removed, and the said J. L. Burke is hereby instructed by an unanimous vote of this board to turn over any and all moneys, papers, books, documents or anything of value in his possession by virtue of the fact that he was once Treasurer of this town; and the Mayor is hereby instructed and commanded to furnish J. L. Burke with a certified copy of this resolution and to take any further and necessary steps to see that compliance is had with these instructions."

The relator, J. L. Burke, had notice and was duly notified of the above-mentioned meetings, orders and resolutions.

From the judgment of the court the defendants appealed, and gave bond to stay execution.

C. E. Whitney and *S. J. Durham* for plaintiff.
A. G. Mangum and *Burwell & Cansler* for defendants.

CLARK, C. J., after stating the facts: The question presented is the right of the town commissioners to remove an official for cause and upon notice.

In 1 Dillon Mun. Corp. (4th Ed.), sec. 240, it is said: "The power to *remove a corporate officer* from his office for reasonable and just cause is one of the common-law incidents of all corporations."

This doctrine, though declared before, has been considered settled ever since *Lord Mansfield's* judgment in the well-known case of *The King v. Richardson,* 1 Burrows, 517. It is there denied that there can be no power of amotion unless given by charter or prescription, and the contrary doctrine is asserted, "that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental."

The same is stated to be the law in 1 Smith Mun. Corp., sec. 200, and in Mechem Pub. Officers, sec. 446. The sub-

ject is fully discussed, with ample citation of authorities and with the same conclusion, in *Richards v. Clarksburg,* 30 W. Va., 491.

Such action could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power. And when the motion is allowable only for cause the soundness of such cause is reviewable by the courts upon a *quo warranto.* Mechem Pub. Officers, secs. 454, 456; 1 Smith Mun. Corp., sec. 202; 1 Dill. Mun. Corp. (4th Ed.), 250; Throop Pub. Off., sec. 364; 2 Abb. Mun. Corp., 636; *Danforth v. Kuehn,* 34 Wis., 229. Trial by jury is not necessary in amotion from office. *Kennard v. Louisiana,* 92 U. S., 480; *Foster v. Kansas,* 112 U. S., 201.

But in this case there was the fullest notice given and opportunity to be heard and sufficient cause shown. If the town commissioners have not supervision of the town funds—if, indeed, they are not responsible for an oversight and control of the disbursement thereof—their duties and powers are of small importance.

In some of the old English cases it would seem that the power of removal of a town officer was vested in the whole corporation, something like the modern "Imperative Mandate and Recall." But in those days the electorate of a town was very small, the franchise being greatly restricted. Our statute (Revisal, sec. 2917) especially provides: "The corporate powers (of towns and cities) can be exercised only by the board of commissioners or in pursuance of resolutions adopted by them, unless otherwise specially provided by law." The charter of Bessemer is in chapter 377, Public Laws 1893, and neither therein nor elsewhere do we find any provision contrary to what is above said.

The judgment of the court below is

Reversed.

LILLIE JACKSON ET AL. v. JOHN BAIRD ET AL.

(Filed 25 May, 1908.)

1. **Tenants in Common—Lands Sold—Purchase by Tenant—Debt of Ancestor—Evidence—Interest Acquired.**

Evidence that S. bought the land held by tenants in common by inheritance, which was sold to pay debts of the ancestor, for and in behalf of one of the tenants, and made deed to him therefor, is insufficient to establish that he thereby holds it in trust for the others or that the legal or equitable title thus acquired must inure to the joint benefit of them all, when there is no evidence of suppression of bids or that the sale was not fairly conducted.

2. **Same.**

One tenant in common in lands held by the cotenancy by inheritance may become the purchaser at the sale of the land to pay the debts of the common ancestor and hold all the land thus acquired in his own right.

ACTION tried before *Guion, J.*, and a jury, at September Term, 1907, of BUNCOMBE.

This is an action brought by the plaintiffs to establish their claim to be tenants in common with the defendant John Baird in the land described in the complaint, and to convert the defendant Laura Baird, who holds the legal title, into a trustee for the benefit of the plaintiffs and John Baird.

At the conclusion of the plaintiffs' evidence the defendants moved to nonsuit, which motion was allowed. The plaintiffs appealed.

Frank Carter, H. C. Chedester and *R. V. Wolfe* for plaintiffs.

T. B. Womack for defendants.

BROWN, J. It is admitted that Robert Baird was the owner of the land in controversy, and that he executed a deed in trust to secure $150 to S. H. Reid, trustee. After Robert Baird's death the land was sold by the trustee, who conveyed it to Mrs. Julia D. Shuford for a consideration of $286, by deed dated 26 May, 1898. George Shuford and his

wife, the aforesaid Julia, conveyed the land to defendant Laura Baird, wife of defendant John Baird, by deed dated 28 May, 1898. The trustee's deed to Mrs. Shuford, although dated 26 May, recites that the sale took place on 28 May. It appears that Laura Baird joined in the execution of the note and deed in trust along with Robert Baird. The plaintiffs allege that the debt was contracted for John Baird's benefit. The defendants deny this, and aver that John Baird signed as surety for his father, Robert Baird. The evidence offered upon this point is very meager and tends to prove that the money borrowed was used in building a house upon the tract of land in controversy, which belonged to Robert Baird.

This case was presented to this Court upon the theory that there is evidence that Shuford bought in the property in trust for Baird, and that consequently, as Baird is a tenant in common with plaintiffs, the title he acquired, whether legal or equitable, must inure to the joint benefit of all. We do not think there is any evidence whatever of a fraudulent combination between Shuford and Baird to effect a secret sale of the property or to suppress bidding, although the testimony of George Shuford may possibly be susceptible of the construction that he intended the property for Baird and that he was acting in his interest.

The contention of plaintiffs that John Baird could not acquire the exclusive title at the sale is founded upon a misapprehension of the law. The general rule is well settled that one cotenant cannot purchase an outstanding title or encumbrance affecting the common estate for his own exclusive benefit, and assert such right against his cotenants. But that rule does not apply under the facts of this case. The title which was acquired by Shuford, assuming that he acquired it for Baird, was not an outstanding title adverse to the title of Robert Baird. It was the title of Robert Baird himself, the common ancestor under whom all claimed, and the sale was being made under a deed executed by such ances-

tor and to pay his debts, which were an encumbrance on the land when it descended to plaintiffs and their coheir. It is held in this State that one cotenant lawfully may purchase his cotenant's share of the common property under execution sale to pay the debt of such cotenant. Likewise it is held that one of the cotenants may purchase the entire property at a sale to pay the common ancestor's debt. *Baird v. Baird,* 21 N. C., 524. In that case *Chief Justice Ruffin* says: "It is a very common case that one brother buys at sheriff's sale the undivided estate of another brother in descended lands, either for debt of the ancestor or that of the brother himself contracted after the father's death; and we believe the legality of such a purchase has never been questioned." Again: "It is not the duty of one heir, or of one tenant in common as such, to pay the debts of another tenant in common, * * * nor to refrain from buying to his own disadvantage, more than it is the duty of any other person wholly unconnected with them." So it is said by *Judge Gaston* that "a tenant in common, as such, is not a trustee for his cotenant." *Saunders v. Gatlin,* 21 N. C., 92.

It is likewise held in England that there is no fiduciary relation existing between tenants in common, as such, and that a tenant in common of property *previously mortgaged,* who purchased the entire property at the mortgage sale, was entitled to hold it for his sole benefit. This is an interesting case, decided by the House of Lords and Privy Council, in which an elaborate opinion is delivered by Lord Herschell and concurred in by the other Lord Justices. See, also, 17 Am. and Eng. Enc., 676, and cases cited; also, Freeman on Cotenancy, secs. 162-165; *Blodgett v. Hildreth,* 90 Mass., 186; *Sutton v. Jenkins,* 147 N. C., 11.

When the land in controversy descended upon these plaintiffs and upon their coheir, John Baird, it was encumbered with the mortgage to Reid made by their ancestor. When that mortgage was foreclosed in the manner allowed by law

any one of the heirs had a right to purchase the entire estate to protect his own interest, and he would acquire the title, discharged of any trust to his coheirs. There is no evidence that John Baird agreed to purchase for the benefit of the other heirs, or endeavored to suppress bidding, or practiced any other fraud upon his cotenants. So far as the record discloses, the sale appears to have been fairly made by the trustee, and it was open to the plaintiffs, or any of them, to attend and purchase if they so desired.

We think, therefore, the judgment of nonsuit should be Affirmed.

WILBER LONG, BY NEXT FRIEND, v. W. A. WARLICK.

(Filed 25 May, 1908.)

Negligence—Evidence—Nonsuit.

In an action for damages occasioned by an injury received by reason of a motorcycle frightening a horse so that it then ran over plaintiff, a motion as of nonsuit upon the evidence should be allowed, when it appears from unconflicting testimony that the horse gave no indication of fright until he was nearly up to the defendant; that the defendant stopped the noise of the machine as soon as he saw the horse, a distance of about 150 yards, and that the machine was standing still when the horse ran over plaintiff and injured him.

ACTION tried before *Peebles, J.*, and a jury, at October Term, 1907, of RUTHERFORD.

This was an action for damages for personal injuries received by plaintiff, alleged to have been caused by negligence of defendant in operating a motorcycle upon the streets of Forest City. It was alleged that defendant frightened a horse driven by one Lytton, and the horse ran away and ran over plaintiff, throwing him to the ground and injuring him. There was judgment against defendant for $200, and he appealed.

McBrayer, McBrayer & McRorie and *B. A. Justice* for plaintiff.

Gallert & Carson for defendant.

BROWN, J. At the conclusion of the evidence the defendant moved to nonsuit plaintiff, upon the ground that there was no evidence that the defendant was guilty of negligence. Upon a careful review of the evidence we are of opinion that his Honor erred in declining to grant this motion.

There is nothing in the record which indicates that the use of motorcycles upon the streets of Forest City is prohibited by law, or that the defendant was operating his machine either carelessly, negligently or at an unlawful rate of speed. The defendant was not required to anticipate that the horse would be frightened at his cycle, although it was his duty to stop his machine when he discovered that the horse was frightened by it and likely to get beyond control. According to the evidence of plaintiff's witnesses the horse gave no indications of fright and did not see the cycle until he was nearly up to the defendant. The plaintiff's witness, Francis, says: "The horse did not seem scared until he saw the cycle, and I think but for it the driver could have controlled him. Until the horse ran over the bridge, I thought the driver had him under control. He saw the cycle about the time he struck the bridge."

Plaintiff's witness, Lytton, the driver of the horse, states that the horse did not begin to shy until near the machine, and that it was when he was opposite it that the horse shied out of the street. According to the other witnesses the horse began to give evidence of fright when some twenty-five yards from the machine. The defendant's evidence tends to prove that he cut off his gasoline and stopped the puffing noise some 150 yards before he met the horse and as soon as he discovered him, and that when the horse shied and ran the buggy on the sidewalk and hurt plaintiff the wheel was standing still.

The entire evidence tends to prove that plaintiff's injury was a misadventure and was not brought about by any negligent conduct of defendant.

The motion to nonsuit is allowed and the

Action Dismissed.

C. F. YOUNCE v. BROAD ROAD LUMBER COMPANY.

(Filed 25 May, 1908.)

Pleadings—Demurrer—Contracts Assumed for Performance.

A demurrer to a complaint, in an action for damages for breach of contract, for that it does not allege a contract or agreement between the parties to the suit, though not frivolous, will not be sustained when it is alleged that the defendant had taken over the contract made by others with the plaintiff and had expressly agreed with him to fully perform it, and failed to comply with such agreement.

ACTION heard on demurrer to plaintiff's complaint, before *Peebles, J.*, at October Term, 1907, of RUTHERFORD.

The court overruled the demurrer, holding that the same was frivolous, and for that reason declined to allow defendant to answer same. Defendant excepted and appealed.

McBrayer, McBrayer & McRorie for plaintiff.

Gallert & Carson for defendant.

HOKE, J. The plaintiff filed a verified complaint and alleged that he, with one Pink Presnell, had entered into a valid contract with one J. Middleby, Jr., to cut into lumber all the merchantable timber on a tract of land known as the Listenbury tract, containing about 1,203 acres, at so much per thousand feet, and plaintiff had become the sole owner of Presnell's interest in the contract, and filed the contract as an exhibit, making the same a part of his complaint; that plaintiff entered on the performance of the contract and had been and was ready and willing to carry out the same according to

the terms thereof; that some time after, to-wit, the latter part of May, said Middleby contracted to sell said lands and timber growing thereon to B. E. Cogbell and D. A. Ritchie, and at said time said Cogbell and Ritchie expressly assumed said contract, expressed in Exhibit A, with this plaintiff, and expressly agreed to carry out the terms and provisions of same in the same manner as Middleby had obligated himself to do; that these parties did comply with said contract in all substantial particulars until October, 1906, when the defendant company "took over the contract from the said Cogbell and Ritchie and expressly agreed with the said Middleby, Jr., to carry out said contract and every feature thereof" with this plaintiff until all the timber on said tract should be cut, etc.; that plaintiff continued to cut and saw timber, according to the terms of the contract, after defendant company acquired the ownership of said land and timber and assumed the liabilities and obligations of the contract, until defendant, in June, 1907, forbade plaintiff from sawing said timber or further complying with the contract concerning it; that at the time defendant wrongfully forced plaintiff to stop cutting there was a large amount of timber uncut, to the extent of over six million feet, and plaintiff was greatly damaged, etc., by defendant's wrong.

The demurrer of defendant was to the effect that the complaint does not show facts sufficient to constitute a cause of action, in that no contract or agreement is alleged between plaintiff and defendant. We have held, in the case of *Biggers v. Matthews*, 147 N. C., 299, that one who bought property about which two others had contracted did not come under personal obligation to pay or perform the contract by reason of buying the property, without more. But the allegations of the complaint are not only that defendant had bought the property, but that it had "taken over the contract from said Cogbell and Ritchie and expressly agreed with Middleby, Jr., to carry out the contract and every feature thereof with

the plaintiff according to the contract, Exhibit A"; further, that "defendant has assumed the liability and obligations of the contract" (complaint, sec. 5). And while it is the general rule that "rights, when coupled with liabilities under an executory contract for personal services, or under contracts otherwise involving personal credit, trust or confidence, cannot be assigned," this limitation on the assignability of contracts only arises or exists for the benefit of the other party; and if such party—here the plaintiff, as he did in this instance—assents to the assignment, the position can no longer be insisted on. Clark on Contracts, pp. 360-364; Anson on Contracts, pp. 287, 288.

We have had occasion, in the case of *Railroad v. Railroad,* 147 N. C., 368, to discuss at some length the doctrine involved in this exception of defendant, and do not consider that further expression on the subject is now required. A proper application of the principles of that decision will sustain the position that, when defendant bought the land and timber and "took over the contract concerning it, and expressly agreed with Middleby, Jr., to carry out the contract with plaintiff and every feature thereof," and plaintiff assented to this assignment, said defendant then and there came under its obligations, and, on a wrongful breach of same on its part, must account in damages. The court below, therefore, made a proper order in overruling the demurrer. We hold, however, that there was error in the ruling that the demurrer was frivolous—that is, one that raises no question for serious consideration, and so clearly untenable as to give indication that it was only interposed for purposes of delay. *Swepson v. Harvey,* 66 N. C., 436; 6 Pl. and Pr., p. 385. We are of opinion that the defendant should have been allowed to answer over, and it is so ordered.

Reversed.

O. M. BRITT v. CAROLINA NORTHERN RAILROAD COMPANY.

(Filed 25 May, 1908).

1. Evidence, Explanatory—Models.

A model may be used by a witness to illustrate his evidence, and when not admitted to be correct it is to be taken in connection with his evidence, and as such to be passed upon by the jury.

2. Damages—Evidence, Competent—Mental Anguish, Present and Prospective.

Mental suffering arising from a physical injury inflicted is a proper element of damages; and testimony of the injured party that, resulting as an immediate and necessary consequence and a part of his mental suffering, he knew he could never be well again, and that it nearly broke his heart to know he would be a cripple for life, is competent.

3. Evidence—Expert Evidence—Opinion, What is Not.

Testimony of a witness concerning a physical fact peculiarly within his own knowledge is not objectionable as expert evidence from a witness who was not legally qualified as an expert.

4. Same.

It is competent for a nonexpert witness to testify that, and to explain why, a double chain would have been safer for the plaintiff to do the work within his employment than a single one which was being used by him at the time of the injury, as being within his own knowledge and observation.

5. Same—Safe Appliances—Harmless Error.

When the testimony of a nonexpert witness is objected to on the ground that it is opinion evidence, and it appears that it was competent upon the question of showing whether a certain appliance furnished by an employer to an employee with which to do his work is approved and in general use, the error, if any, committed is harmless.

6. Evidence—Exceptions, When Taken.

When it appears that the testimony objected to could have been sustained as that of an expert, objection that the witness did not qualify as such should have been taken on the trial at the time.

7. Appeal and Error—Former Decision—Rehearing.

A matter of law determined on appeal will not again be heard on another appeal in the same case. The proper procedure is upon a petition to rehear.

8. Instructions, Special—General Charge.

There is no error when the special instructions given are correct when read in connection with the general charge.

9. Instructions, Special—Facts Involved.

Prayers for special instructions are erroneous which ask the court to find facts or direct the findings of the jury upon the question of contributory negligence in favor of defendant, upon whom is the burden of proof.

10. Appeal and Error—Evidence—Exceptions, When Taken.

Exceptions taken on the trial, but which are neither in the assignment of error nor grouped at the end of the case on appeal, nor mentioned in appellant's brief, are deemed as abandoned in the Supreme Court.

ACTION tried before *Jones, J.*, and a jury, at September (Special) Term, 1907, of ROBESON.

Defendant appealed.

Meares & Ruark, McIntyre, Lawrence & Proctor, R. E. Lee and *E. M. Britt* for plaintiff.

McLean & McLean for defendant.

CLARK, C. J. This case was here on a former appeal (144 N. C., 242), in which the facts, substantially the same as now, are fully stated, and can be referred to without repeating them here.

There were fifty exceptions taken at this trial, of which exceptions 1, 3, 7, 12, 20, 35, 39, 46, 47, 48, 49 and 50 are abandoned, not being in the assignment of errors grouped at the end of the case on appeal. Exceptions 11, 13, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38 and 39 are abandoned, either expressly in the appellant's brief or by not being mentioned therein. Rule 34 of this Court, 140 N. C., 666. The remaining twenty-three exceptions can be considered under a very few heads. It would much facilitate the argument and decision of causes if counsel would always thus carefully go over the exceptions, taken out of abundant caution during the trial, and eliminate all except those which on reflection are deemed vital, and thus concentrate their argument and our attention on the pivotal points of the case.

Exception 2, that the plaintiff was allowed to use a model to illustrate his evidence, cannot be sustained. It is like an unofficial map or diagram used by a witness, not as substantive evidence, but "for the purpose of enabling the witness to explain his testimony and enabling the jury to understand it." For this purpose maps, diagrams, models and photographs have been allowed in both criminal and civil actions. *State v. Wilcox,* 132 N. C., 1135; *Peebles v. Graham,* 130 N. C., 262; *Riddle v. Germanton*, 117 N. C., 387. These have often been sent up to this Court to enable us to better understand the testimony in the record and the arguments of counsel. Indeed, it seems this same model was used in the argument here on the former appeal and on this, and its use has been helpful to us, as it must have been to the jury, and, indeed, to counsel themselves in expressing their contention. Except when the map or model is agreed upon as correct, it must be taken only as a part of the testimony of the witness, for what it is worth.

Exceptions 4 and 19 are to the admission of evidence of mental suffering and an instruction to the jury that it was an element of damages if the plaintiff had been injured by the negligent conduct of the defendant. The charge on this point is a copy of that approved in *Clark v. Traction Co.,* 138 N. C., 78; *Wallace v. Railroad,* 104 N. C., 442. Mental suffering accompanying physical injury has always been held a proper element of damages to be considered by the jury. *Walker v. Railroad*, 131 N. C., 536; *Smith v. Railroad,* 130 N. C., 304. The defendant objects because the witness stated as part of his mental suffering that he knew he could never be well again, and that it almost broke his heart to know that he would be a cripple for life. This, however, is a part of the suffering, like the physical suffering, the decreased earning capacity, the cost of nursing and medical attention, which are a part of the "present and prospective loss" resulting from the injury, and the immediate and necessary consequences thereof.

Exception 5 is that the witness was asked to state "whether or not, in your opinion, you could have straightened the log on the skid, before it fell and hurt you, by the use of your cant hook, if the team had not started when it did and, as you say it did, without warning." The witness replied that he could. The answer was also excepted to. This was the statement of a physical fact peculiarly in the knowledge of the witness, of a matter which he saw with his own eyes and to which his attention was acutely drawn. The weight to be given to his testimony was for the jury, but they were entitled to have it to weigh. It was not an expression of a theoretical opinion, nor an inference from facts stated by others. He spoke of his own knowledge and experience. In *Arrowood v. Railroad,* 126 N. C., 632, it was held competent for witness to state that, having seen the light cast by the headlight of an engine at a certain point on the track, the engineer could have seen a man lying on the track. This was held a matter of common observation, not requiring expert evidence. Here the witness occupied the same position as if the engineer himself had testified in the *Arrowood case.* In *Raper v. Railroad,* 126 N. C., 565, it was held "clearly competent" to ask a witness: "If the roadbed beneath the rail and guard rail had been filled to within two inches of the top rail, would it have been possible for the shoe to have been caught in the rail?" In *Burney v. Allen,* 127 N. C., 476, it was held competent for a witness who had personal knowledge of a room and the location of its furniture to testify whether the testator, lying in a position testified to by other witnesses, could have seen the subscribing witnesses at the spot testified to. All these matters of physical facts are not "opinion evidence," in the legal sense of that term. They are not theoretical nor conclusions drawn by inference, but statements of facts from personal observation, and hence also they are not "expert" evidence.

Exceptions 6 and 8 are that the witness was allowed to state that the "V" chain or double chain would be safer than

the single chain; and exception 9 is that he gave as a reason for the double chain being safer: "Because we put one on each end of the log, and then there is no chance for the log to get away; one end may be heavier and larger than the other, but the chain will keep it up." 5 Encyc. Ev., 654, summarizes the decisions thus: "The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning, but it includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury," citing, among other cases, *State v. Edwards,* 112 N. C., 901. This is a clear statement of a well-settled principle, and is a common-sense restriction which keeps the wise general rule as to "opinion" and "expert" evidence from degenerating into absurdity. Numerous cases are cited in the plaintiff's brief in support of this proposition, and many others can be added, but it is not necessary to cite them. There are no cases in our Court to the contrary. In *Cogdell v. Railroad,* 130 N. C., 313, it was held, two Judges dissenting, that it was incompetent for the witness to state that if the plank had been sound and not rotten it would have borne a man of Cogdell's weight with safety. On rehearing, the former opinion was reversed (132 N. C., 852), though not on this point. While that case is different from this, in that it was not shown that the witness had common observation of the weight planks would bear, we are inclined to doubt if it should be followed; but at any rate it is not a precedent against the ruling of the Judge in this case. Besides, the testimony in this case could be sustained as that of an expert, and it is too late now to object that the witness did not qualify as an expert. His evidence showed that he was. Moreover, the test was not whether the double chain was safer than a

single one (almost a self-evident proposition), but whether the single chain was in general use; and if the admission of the evidence had been erroneous it would have been harmless error.

Exception 10 was as to an impeaching question asked a witness, and needs no discussion.

Exceptions 14, 15, 16 and 21 present the question as to the liability of the company and whether the plaintiff was its employee. This was fully discussed in the former opinion (144 N. C., 242), which held favorably to the plaintiff. The court below followed the opinion of this Court in its instructions submitting that question to the jury, and we will not hold that it erred in so doing. The jury, under a charge in accordance with our ruling, has found this fact with the plaintiff. The defendant, if dissatisfied, should have applied for a rehearing of our opinion. In *Holley v. Smith,* 132 N. C., 36, it was held that a matter of law determined on appeal will be reviewed only on a rehearing, and cannot be again brought in question by another appeal in the same case. To same effect *Jones v. Railroad,* 131 N. C., 133; *Best v. Mortgage Co., ib.,* 70; *Perry v. Railroad,* 129 N. C., 333; *Setzer v. Setzer, ib.,* 296; *Hendon v. Railroad,* 127 N. C., 110.

Exceptions 28, 29, 30, 31, 32 and 33 are to special instructions given at request of the plaintiff. When read in connection with the general charge, we find in them nothing of error.

Exceptions 40, 41, 42, 43 and 44 are to the refusal of certain prayers of defendant. They were properly refused, except so far as covered in the general charge, because they asked the court to find the facts and, further, to direct the finding of an issue in favor of the defendant, on whom rested the burden of showing contributory negligence.

Exception 45 is to the refusal of a prayer which, so far as it was proper, was substantially given in the charge.

All the other exceptions were abandoned, as heretofore stated.

After full and careful consideration of the entire record, and with the aid of a very able argument on both sides, we find

No Error.

A. N. ROGERS v. J. E. SLUDER ET AL.

(Filed 25 May, 1908.)

Processioning—Surveyor—Consent Judgment—Compliance—Jurisdiction—Fraud or Mistake.

In proceedings for the processioning of lands consent judgment was entered in the Superior Court, to which the case, on issue joined, had been transferred, that the plaintiff was the owner and entitled to the quiet possession of the land, the boundary to which was in dispute; that a surveyor be appointed to run, mark and establish the corners and lines and file a report of same with the Clerk, to be recorded as a part of the minutes in the action. The surveyor, after notice and in the presence of the parties and others, located the line and made full report to the court, including a map of the lands located: *Held*, (1) under Revisal, sec. 614, the Judge in term time had full jurisdiction to hear and determine all matters in controversy and enter the judgment as above; (2) the court subsequently had no power to modify or set the judgment aside, except for fraud or the mistake of both parties.

PROCEEDINGS instituted before the Superior Court of Buncombe County to procession lands of plaintiff set out and described in the petition, transferred, on answer filed by defendants, to the civil issue docket of the Superior Court of BUNCOMBE County, where final judgment was entered in plaintiff's favor by *Guion, J.*, at October Term, 1907.

Defendants excepted and appealed.

Mark W. Brown and *Wells & Swain* for plaintiff.

H. B. Carter and *W. P. Brown* for defendants.

HOKE, J. The plaintiff filed his petition alleging ownership of a tract of land within a given boundary, fully and properly set out; and, defendants having answered, the cause was transferred to the civil issue docket of the Superior Court of Buncombe County, and at September Term, 1906, of said court a consent judgment was entered, by which it was declared that the plaintiff was the owner of the land and premises described in the complaint, and entitled to the quiet and peaceable possession of same; and the judgment proceeded further, as follows:

"And it having been further agreed between the parties hereto that the court appoint a competent surveyor to run and mark the corners and lines of said land and premises, as above described, it is further ordered and adjudged that A. A. Hamlet be and he is hereby appointed an officer of this court, to survey and mark out the lines and corners of the above-described tract of land, including the lines between the plaintiff and defendants, and that the lines so marked out by said A. A. Hamlet and the corners so established by him shall become and remain the fixed lines and corners of the plaintiff's tract of land. Said A. A. Hamlet shall forthwith proceed to make said survey in accordance with this order, and file a report of same with the Clerk of this court, to be recorded as a part of the minutes in this action."

Pursuant to this judgment the surveyor appointed notified the parties and, in the presence of plaintiff, defendants and others, surveyed and located the lines of the boundary set out and described in the petition and judgment, and on 12 January, 1907, made full report of his action to the court, including a map of the lands as located by him. Defendants filed several exceptions to the report, alleging various errors therein, and at October Term, 1907, before his Honor, *Guion, J.*, moved the court as follows:

"1. To set aside the judgment heretofore rendered in said cause, at September-October Term, 1906, of the Superior

Court of Buncombe County, because the court had no jurisdiction to render said judgment and because said judgment was irregular and contrary to the course and practice of the court.

"2. To remand said cause to the Clerk of the Superior Court of Buncombe County with directions to proceed therein according to law.

"3. To set aside the report of A. A. Hamlet, surveyor, heretofore filed in this cause, because the survey referred to in said report was incorrectly made and contrary to the directions given in the alleged judgment heretofore rendered in this cause, as pointed out in defendants' exception herein filed to said report."

Defendants further demanded a jury trial on an issue as to whether the surveyor had located the lines correctly and in accordance with the judgment of September Term, 1906; and moved, further, that the report of the surveyor be set aside and the matter be referred to some other competent surveyor, to be selected by the court. His Honor overruled all of these objections made by defendants to the validity of the report, and entered judgment in substance declaring the lines as located by the surveyor and contained in his report to be the true boundary of the land. There was no error in overruling defendants' objections to the proceedings, and the judgment by which same were confirmed and established must be affirmed.

The cause having been transferred to the Superior Court on issues raised by the pleadings, under our statute (Revisal, sec. 614), the Judge in term time had full jurisdiction to hear and determine all matters in controversy and to enter the judgment which was rendered. There are no facts presented tending to establish such a departure from the judgment directing a survey as to authorize or permit the court to set such survey and report aside because same did not comply with the judgment as rendered. So far as appears, the sur-

veyor acted throughout in compliance with the order, and has located the lands described in the petition according to his best judgment; and, this judgment directing the survey having been entered by consent, the court had no power to "set aside or modify the same, except for fraud or the mistake of both parties." *Vaughan & Barnes v. Gooch & Prescott,* 92 N. C., 524; *Bunn v. Braswell,* 139 N. C., 135.

There was no error, and the judgment entered in the court below is

Affirmed.

STATE EX REL. J. L. BURKE, TREASURER, v. COMMISSIONERS OF BESSEMER CITY.

(Filed 25 May, 1908.)

1. **Title to Office—Procedure—Mandamus.**
   Title to office cannot be determined by *mandamus.*

2. **Mandamus — Town Commissioners — Bond, Acceptance and Approval—Ministerial Duties.**
   A *mandamus* will only lie against the town commissioners to compel the consideration of a bond offered by the town treasurer, and not to compel them to accept and approve it, the commissioners being individually liable in taking one which they knew or should have known was insufficient.

3. **Quo Warranto—Officer Inducted—Tender of Bond—Judgment Revoked—Procedure.**
   When an officer is in office by virtue of a judgment in *quo warranto* proceedings, and it is contended that he has not tendered a proper bond, he cannot be ousted, except when, upon application to the court, the judgment of induction is revoked for his failure to do so.

ACTION heard by consent by *Ferguson, J.,* at chambers in Charlotte, 27 September, 1907, from GASTON.

Defendants appealed.

C. E. Whitney and *S. J. Durham* for plaintiff.

Burwell & Cansler and *A. G. Mangum* for defendants.

CLARK, C. J. This is a *mandamus* to compel the town commissioners of Bessemer to reinstate the relator in the office of town treasurer, from which he had been removed by them, and to approve the bond tendered by him. The court, without passing upon the prayer to compel reinstatement, ordered the defendants to "accept and approve" the bond tendered.

The facts of this controversy are set out in the *quo warranto* proceedings—*Burke v. Jenkins, ante*, 25 (which are hereby referred to and made a part of this case), in which it was adjudged that the relator was not entitled to recover said office. This proceeding, therefore, has no longer any purpose. It is proper to observe, however:

1. That title to office cannot be determined upon a *mandamus*. *Ellison v. Raleigh,* 89 N. C., 125; *Brown v. Turner,* 70 N. C., 93; *Howerton v. Tate,* 66 N. C., 231.

2. That, unless the title to the office is uncontested or has been adjudged on a *quo warranto,* a *mandamus* cannot issue as to the bond, and even then it cannot require the defendants to "accept and approve" the bond. It can only require them to act, not compel their judgment, because they are individually liable if they take a bond known, or which should be known, by them to be insufficient. *Buckman v. Commissioners,* 80 N. C., 121; *Harrington v. King,* 117 N. C., 117; *Barnes v. Commissioners,* 135 N. C., 38; *Glenn v. Commissioners,* 139 N. C., 419. A judgment for plaintiff on a *quo warranto* compels his admission to office. The *mandamus* lies to compel the consideration of the bond then tendered by him, not its acceptance. Should it be factiously rejected, that matter can be shown in proceedings for *mandamus*, and possibly by action for damages against the factious board. In the meantime the officer is in office by virtue of the judgment, and can be again ousted only upon application to the

court to revoke its judgment of induction for his failure to tender a proper bond. The judgment herein was premature and unauthorized.

Reversed.

W. B. MERSHON & CO. v. R. E. MORRIS, RECEIVER FRY-WALKER LUMBER COMPANY.

(Filed 25 May, 1908.)

1. **Appeal and Error—Facts Agreed—Exceptions—Procedure.**
   On an appeal from a judgment rendered upon an agreed state of facts no exception or assignment of error is necessary, as the appeal brings up the entire record and is an exception within itself.

2. **Corporations—Acts of Officers—Contracts to Purchase—Seal Unnecessary.**
   A president of a corporation has authority to sign an order for machinery for its use, wherein it is contracted that the title shall remain in the vendor until full payment has been made, and it is not necessary to affix the corporate seal thereto.

3. **Corporations—Acts of Officers—Presumptions—Evidence.**
   When the appropriate officer or agent of a corporation executes a contract in its behalf for the purchase of machinery for its use, which the corporation is lawfully authorized to make, a preceding authority for the act of the officer or agent is presumed, and evidence thereof from the records of the company is unnecessary.

4. **Corporations—Contracts—Receiver's Title.**
   Under a contract by a corporation to purchase certain machinery for its use, reserving the title in the vendor till paid, a receiver subsequently appointed takes only such title as the corporation had.

CASE AGREED, heard by *Justice, J.*, at chambers in RUTHERFORD, 24 December, 1907.

Parties plaintiff and defendant, having a question in difference which might properly become the subject of a civil action, and desiring to avoid the expense and delay of an action, have agreed upon the following case, which contains

all the material facts upon which the controversy depends, and herewith submit the same, with the request that the court render such judgment as may be proper in the premises. It is agreed:

1. That the Fry-Walker Lumber Company is a corporation duly chartered by the State of North Carolina prior to the dates mentioned herein, and that Robert E. Morris was duly appointed receiver of the Fry-Walker Lumber Company by an order of the Superior Court of Rutherford County in that certain action entitled *E. A. Walker et al. v. Fry-Walker Lumber Company*, and, as such, is authorized, empowered and directed to wind up and settle the business of said corporation, and to bring and defend actions when same are necessary in the furtherance of such settlement.

2. That on 17 September, 1906, the said Fry-Walker Lumber Company purchased from the plaintiff certain machinery at the price of $550, of which $200 was paid in cash on the delivery of the machinery purchased, and the balance, in two notes of $175 each, at five per cent. from date, to be due 15 November, 1906, and 15 January, 1907, and that there is still a balance of $176.50, with interest from 15 January, 1907, unpaid on said notes; that said machinery at the time of the appointment of the receiver was in the possession of said Fry-Walker Company and was being used by it, and was necessary to the proper operation of its plant; that at the time of the delivery of said machinery a paper-writing was made, which is hereto attached and made a part and parcel of this agreement, and marked "Exhibit A":

"W. B. MERSHON & Co.,

Main Office and Works, Saginaw, Michigan.

"Subject to strikes, accidents or other delays beyond your control, please ship in good order the following machinery, f. o. b. Saginaw, Michigan, about ....., at once.....:

"One rebuilt Ideal band saw, complete, with blue-prints

and directions for setting up and operating, but without saw blades or filing-room equipment, for which we agree to pay, as below, after date of shipment, $550, with exchange. The purchaser agrees to make settlement within thirty days from date of shipment, and to then evidence all payments due at a later date by notes bearing date of shipment, with interest, as follows: $200 cash on delivery of machine; $175 by note bearing date of invoice, with interest at five per cent., maturing 15 November, 1906; $175 by note bearing date of invoice, with interest at five per cent., maturing 15 January, 1907. It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash, and that this contract is not modified or added to by any agreement not expressly stated herein; and that a retention of all the property forwarded after thirty days from date of shipment shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made for the consignor, and invalidate all its contracts of warranty, express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of W. B. Mershon & Co.

"Ship *via* .....

(Signed) "FRY-WALKER LUMBER CO.,

"By H. W. FRY, *President and Treasurer.*

"In the presence of JOHN W. CALLAHAN."

Proven by the oath of the subscribing witness, and recorded.

3. It is agreed that the Fry-Walker Lumber Company is insolvent, its liabilities exceeding its assets by several thousand dollars. It is agreed that the Fry-Walker Lumber Company had no common seal and did not use any in the execution of its contract, and that the officers who signed "Exhibit A," attached, were the duly elected and acting officers of said corporation.

The plaintiff contends that, by reason of the foregoing paper-writing, set forth above and attached as "Exhibit A," it has a lien on the property mentioned therein which is prior to other creditors, who do not hold mortgages, and it should be fully paid the amount mentioned therein in preference to general creditors. The defendant contends that the said paper-writing does not constitute a lien on the property therein mentioned, and that plaintiff did not acquire any lien by reason thereof, but is only a common creditor, entitled to share equally with other common creditors in the assets of the aforesaid Fry-Walker Lumber Company.

This reference and agreement are made under Revisal, secs. 803 *et seq.*, and it is agreed that the court may render such judgment as to the aforesaid paper-writing as may be proper. If the same constitutes a lien the court may so adjudge, and if the same does not create a lien the court may so adjudge.

Duly verified.

His Honor rendered judgment for plaintiff. Defendant excepted and appealed.

No counsel for plaintiff.

R. S. Eaves and *J. P. Morris* for defendant.

CONNOR, J., after stating the facts: We concur with counsel for appellant that when a case is submitted upon an agreed state of facts or upon demurrer no exception or assignment of error is necessary. The appeal brings up the entire record, and is itself an exception. *Reade v. Street*, 122 N. C., 301; *Wilson v. Lumber Co.*, 131 N. C., 163, where the subject is discussed, the authorities cited, by the present Chief Justice.

A careful examination of these opinions will remove what seems to be some doubt in the minds of the profession upon the subject. We concur with his Honor in holding that the order, which includes the contract for the machine, was properly signed by the president. Womack Private Corp., 461. There was no necessity for the corporate seal. For the varied

transactions of a business or manufacturing corporation it would be impracticable to require every letter, order, contract, note, check or draft to have the corporate seal attached. The general rule, sustained by well-considered decisions, is thus laid down by Judge Thompson: "Excluding the operation of express statutes, a very extensive principle of the law of corporations, applicable to every kind of written contract executed ostensibly by a corporation and to every kind of act done by its officers and agents professedly in its behalf, is that, when the officer or agent is the appropriate officer or agent to execute a contract or do an act of a particular kind in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation, always provided that the corporation itself had the power under its charter or governing statute to execute the contract or do the act." 10 Cyc., 1003.

The ancient rule that a corporation could act only by its seal has been greatly relaxed in later times, if, indeed, not wholly abrogated. *Ib.*, 1004; *Columbia Bank v. Patterson*, 7 Cranch, 299. The contract was simply an order for a machine, with the terms or proposition to purchase set out, among others that the title to the property was to remain in the vendor until paid for. It would be a singular result if the corporation or its receiver could retain the property thus coming into its possession without paying for it, and repudiate so much of the president's proposition as secured to the vendor payment of the purchase money because he did not put the corporate seal to the proposition to buy. If he had no authority to make the contract, or did not observe the form prescribed in doing so, no title passed to the corporation. By ratifying his act and taking the property it waived any informality, if there was any, in the form of making the contract.

It is immaterial whether the paper was recorded. The

receiver takes whatever title the corporation had, and nothing more. In no point of view is there any error in his Honor's judgment. It is

Affirmed.

GORDON HOLLOW-BLAST GRATE COMPANY v. ROBERT E. MORRIS, RECEIVER.

(Filed 25 May, 1908.)

For digest, see Mershon against same defendant, next preceding.

ACTION heard by *Justice, J.*, at chambers, 18 November, 1906, from RUTHERFORD.

This was a controversy submitted without action. The facts, exhibits, etc., are the same as in Mershon against same defendant, the only difference being that the property purchased from the plaintiff was "one No. 16 Town one-man two-saw trimmer, complete, with two saws." Judgment was rendered for plaintiff. Defendant excepted and appealed.

No counsel for plaintiff.

R. S. Eaves and *J. P. Morris* for defendant.

CONNOR, J. The decision of this appeal is governed by what we have said in *Mershon's case*. It is not necessary to discuss the matter further. The judgment is

Affirmed.

PETER STROUD AND WIFE v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 25 May, 1908.)

1. Insurance—Contract Induced by Fraud—Subsequent Payments—Waiver.

When it is established that an insurance company has induced the insured to take a policy of life insurance by false and fraudulent representations, causing him to believe he could get the amount paid in premiums, with interest, at the expiration of a five-year period, the insured, by then making demand and afterwards continuing to pay for another five-year period under like representations and conditions, does not waive his right of action.

2. Insurance—Contracts—Torts—Waiver—Justices of the Peace—Jurisdiction.

When an insurance company has received premiums from the insured under a contract of insurance induced by false and fraudulent representations, the insured may waive the tort and sue for money had and received; and, an action therefor being *ex contractu*, the justice's jurisdiction is not limited to $50, as in action for tort.

ACTION tried on appeal from the court of a justice of the peace, before *Guion, J.*, and a jury, at September Term, 1907, of BUNCOMBE.

The plaintiffs, Peter Stroud and his wife, Margaret, each sued defendant company for $100, money alleged to have been obtained from them by false and fraudulent representations in reference to insurance policies issued to plaintiffs. The actions, without objections noted, were consolidated, and issues were submitted and responded to by the jury as follows:

1. "Is the defendant indebted to plaintiff Peter Stroud, and if so, in what sum?" Answer: "Fifty-two dollars, with interest from the date of the policy."

2. "Is the defendant indebted to the plaintiff Margaret Stroud, and if so, in what sum?" Answer: "Fifty-two dollars, with interest from date of policy."

There was judgment in favor of each plaintiff in accordance with the verdict, and defendant excepted and appealed.

Julius C. Martin for plaintiffs.

Frank Carter, H. C. Chedester and *Craig, Martin & Winston* for defendant.

PER CURIAM: This case is substantially similar to that of *Caldwell v. Insurance Co.*, 140 N. C., 100, in which a recovery by the plaintiff was sustained.

There was evidence on the part of plaintiffs tending to show that they were induced by false and fraudulent representations on the part of defendant's agents to accept a policy of insurance in defendant company, on the assurance that at the end of five years they could get their money back, with interest. At the time specified plaintiffs demanded their money, and were induced by the same kind of assurances and statements to remain in the company and continue their payments for another period of five years, when, defendant failing to pay according to the contract as understood by plaintiffs, the suits were instituted.

There was no objection made to the rule by which the amount of plaintiffs' recovery was ascertained and established, but it is urged for error that plaintiffs, on their own statements, were put upon notice by failure of defendant company to return plaintiffs their money at the end of the first five years, and they had waived their right to make the present claim by continuing to make payments after this notice given. The answer is that, according to plaintiffs' evidence, these payments during the second period were made under and by virtue of the same false statements and assurances by which the first were procured, and, under a charge to which there is no specific exception, the jury has evidently accepted the statements of plaintiffs as true; and on these facts the authority referred to (*Caldwell v. Insurance Co., supra*) is decisive against defendant's position.

It is further insisted that, the action being one to recover damages for fraud and deceit, the justice had no jurisdiction beyond the sum of $50, and the action should on that account be dismissed. This would be a correct position if the plaintiffs had sued to recover damages for fraud and deceit, this being an action in tort; but, while the demand arose by reason of defendant's tort, the authorities are all to the effect that when a defendant has wrongfully obtained and holds plaintiffs' money through a fraud of this character it is open to plaintiffs to waive the tort and sue for money had and received. This they have done in the present instance, and, the action in this aspect of the matter being *ex contractu*, the justice's court had jurisdiction. *Manning v. Fountain*, 147 N. C., 18; *Parker v. Express Co.*, 132 N. C., 128; Clark on Contracts, pp. 538, 539; Keener on Quasi Contracts, pp. 159-180.

There is no error, and the judgment below is affirmed.

No Error.

CITY OF ASHEVILLE v. F. M. WEAVER ET AL.

(Filed 25 May, 1908.)

Cities and Towns—Condemnation of Lands—Notice to Owners—Description.

In condemnation proceedings by a city of lands beyond its limits for the purposes of waterworks and water supply, under authority conferred by statute, it is not necessary to enumerate in the resolution of the board of aldermen, or the notices to the owners given in pursuance thereof, the exact purposes for which the land might be needed, if the descriptive language of the statute is followed, which enumerates them in the disjunctive; and it is unnecessary to give exact boundaries, for it is sufficient if the various tracts are given and the owners notified.

ACTION heard by *Guion, J.*, at September Term, 1907, of BUNCOMBE.

Davidson, Bourne & Parker and *H. B. Carter* for plaintiff.

J. M. Gudger, Jr., Frank Carter and *Locke Craig* for defendants.

CLARK, C. J. This is a proceeding to condemn certain lands, known as the "Dillingham Speculation Lands," as a watershed, and for erecting reservoirs and dams, laying pipes, putting up buildings and doing all other things necessary for the operation of waterworks by the city of Asheville, including the safeguarding of the purity of the water at its source of supply. The proceeding was instituted by virtue of authority conferred by Private Laws 1901, ch. 100, secs. 65 and 66; also by Private Laws 1903, ch. 9, sec. 5.

The resolution was passed by the board of aldermen and notices duly served on the property holders, the jury summoned, who made their report, setting out the boundaries specifically, the purposes for which the land was condemned, and assessing the damages. Their report was adopted by the board of aldermen.

Three of the landowners excepted and appealed to the Superior Court. In that court they demurred, on the ground that the resolution of condemnation and the notice to the landowners were void for uncertainty, in that they did not "define the nature and extent of the appropriation of the lands of appellants nor point out the portion of the lands proposed to be appropriated or the nature or extent of the rights proposed to be acquired by said city in said land."

The material part of the resolution is as follows:

"The following proceedings were had at a meeting of the Board of Aldermen of the City of Asheville on 28 August, 1903:

"At a meeting of the Board of Aldermen of the City of Asheville held on 21 August, 1903, it was decided that, in the opinion of said board, certain lands belonging to the parties hereinafter named, or a right of way therein, were required

for the purpose of erecting, making or establishing reservoirs, dams or ponds, tanks or other receptacles of water, and for laying supply pipes and for obtaining a supply of water, and the erection or construction of houses, stations and machinery to be used in so doing, for the use of said city or its inhabitants, and for other purposes connected with the successful operation of waterworks in and for said city, including the protection of the watersheds on the Upper Swannanoa River, which constitute the source of water supply for said city, in order that said source of water supply may be kept pure and healthful; and it satisfactorily appearing that said board of aldermen and the owner or owners of such lands or right of way cannot agree as to the price to be paid therefor, and it further appearing to the said board of aldermen that said property lies without the limits of said city: It is therefore ordered by said board of aldermen that the mayor of said city of Asheville forthwith issue his writ, under the seal of said city," etc., following the usual form. The writ from the mayor and the notices to landowners conformed to the words of the resolution, and the proceedings were in the regular legal forms.

The demurrer raises the objection that the resolution and notices used the word "or" in stating the purposes. In this the plaintiff copied *verbatim* the words of the statute, and defendants' authorities that the statute in such cases must be *strictly* followed are singularly against them. The plaintiff did not know before the survey and examination for what purposes it might need the land; so it enumerated them all in the disjunctive, as in the statute. For the same reason the exact boundaries of the lands to be taken could not be known and were not given, but the tracts to be affected were given and the owners duly notified. The report of the jury, after viewing the land, recites with entire definiteness the boundaries of the land condemned and the purposes for which it was taken, and

assesses the damages. This was sufficient. It was the lands and for the purposes stated in their report that the jury assessed the damages.

The judgment overruling the demurrer is

Affirmed.

JOHNSON CITY SOUTHERN RAILWAY COMPANY v. SOUTH AND WESTERN RAILROAD COMPANY ET AL.

(Filed 25 May, 1908.)

1. **Condemnation—Statutes, Construction of.**

Section 2580, Revisal, stating the requisites of a petition in condemnation proceedings, must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality.

2. **Same—Appeal—Procedure—Record.**

The appeal, provided by section 2587, from a judgment by the Clerk of the Superior Court in condemnation proceedings, under Revisal, sec. 2580, takes the entire record up for review upon questions of fact to be tried by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed.

3. **Condemnation—Appeal—Clerk of Court—Findings of Fact Not Final.**

The findings of fact of the Clerk upon preliminary allegations, under Revisal, sec. 2580, in condemnation proceedings are not final and may be appealed from. Revisal, sec. 2587.

4. **Condemnation—Appeal—Exceptions, How Taken.**

Upon proper denial of the matters alleged in the petition, exceptions to the Clerk's order appointing commissioners in condemnation proceedings may be of a general character, and, upon appeal, will present any question appearing upon the record.

5. **Same—Brief—Abandoned, When.**

Exceptions appearing of record but not referred to in appellant's brief are treated as abandoned in the Supreme Court. Rule 34, 140 N. C., 666.

6. **Condemnation—Nonsuit—Defendant's Rights—Procedure.**

In proceedings by one railroad company to condemn a right of way upon which another was lawfully constructing its roadbed the plaintiff may not, as a matter of right, submit to a judgment

of nonsuit after having obtained an order, in the progress of the case, giving it exclusive possession and ejecting the defendant from the *locus in quo*.

7. Same—Answer—Interests Involved—Rights of Public.

When a defendant railroad company in possession of the *locus in quo*, the subject of condemnation proceedings by another railroad company, has set up new matter in its answer involving its rights to its exclusive occupation thereof, alleging that large sums had been invested in the prosecution of its work thereon, and larger sums for investment are awaiting the termination of the controversy involving the construction of this important line of railroad, it is entitled to have its claim adjusted and settled, and it is for the public good that a settlement of the controversy be had, and plaintiff's motion for judgment of nonsuit was properly refused.

8. Condemnation—Appeal—Findings of Fact Conclusive.

In condemnation proceedings, when it is proper for the lower court to find the facts, his findings upon competent supporting evidence are conclusive.

9. Condemnation Froceedings—Petition—Allegation of Failure to Agree.

It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and reason of the failure to do so. In the absence of proof thereof the petition should be dismissed.

10. Same—Burden of Proof.

The burden of proof is on the petitioner in condemnation proceedings to show, in support of the necessary allegation to that effect, that a previous effort to acquire title to the *locus in quo* by agreement had been made, and the reason of the failure therein, and he is not relieved of this necessity by the denial in the answer of his right to condemn.

11. Condemnation—Bond—Appeal—Liability—Procedure.

The amount of damages upon plaintiff's bond on appeal in condemnation proceedings may be assessed at the next term of the trial court, when a judgment below adverse to him is sustained on appeal. Revisal, sec. 1542.

CONDEMNATION PROCEEDINGS, heard by *Peebles, J.*, at Fall Term, 1907, of YANCEY.

This is a special proceeding instituted by the plaintiff, Johnson City Southern Railway Company, against the defendant, The South and Western Railroad Company, and

others, before the Clerk of the Superior Court of Yancey County, by summons duly issued by him on 15 December, 1905. The plaintiff on the same day duly filed its petition before said Clerk against the defendants, asking that the court make an order in the proceeding appointing three disinterested and competent freeholders to appraise and assess the benefits to certain lands which it sought to have condemned and subjected to its use for railroad purposes, and the damages thereto resulting from or to be caused by the construction of the plaintiff's railroad thereon, and to ascertain and determine the compensation, if any, which ought to be made by the petitioner to the defendants or either of them. It was alleged in the petition that the petitioner was a railroad corporation, duly chartered, organized and existing under the laws of the State of North Carolina; that it was by said charter authorized and empowered to construct and operate a railroad between certain points and over the lands sought to be condemned in the petition; that it was the intention of the petitioner in good faith to construct, finish and operate its said railroad between such points; that such part of its capital stock as was required by its charter to be subscribed had been duly and in good faith subscribed; that the defendants were the owners or claimed an interest in the lands sought to be condemned; that the same were required for the purposes of constructing and operating said proposed railroad thereon; that the petitioner had been unable to acquire title thereto because of failure to agree with the owners as to the value of the same, and that, as it was informed and believed, the location and construction of the said proposed road on said land would result in real benefit thereto largely in excess of any damage which the defendants might sustain by reason of the construction and operation of said railroad. There was attached as an exhibit to said petition a map showing how the line of the road was to be located on the lands sought to be condemned, and a profile showing the depth of the cuts and

the height of the embankments on the lands sought to be condemned and at what points on said land such cuts and embankments were located.

The South and Western Railroad Company filed its answer, denying the allegations of the petition and setting up the fact that it had, prior to the institution of this proceeding, located its line on the land sought to be condemned and purchased same, and that the land was necessary for the exercise of its franchise and the discharge of its duties.

The Clerk appointed commissioners to assess the damages, and the South and Western Railroad Company excepted to this order.

Prior to the order appointing commissioners the Johnson City Southern Railway Company made a motion to be allowed to take possession of the land sought to be condemned, which was granted by the Clerk, and from this last-mentioned order the South and Western Railroad Company appealed to the Judge, and the order was reversed on appeal.

In the meantime, however, the commissioners had made their report, and the Johnson City Southern Railway Company paid into court the sums ascertained by the commissioners and continued in possession.

The South and Western Railroad Company filed exceptions to the report of the commissioners, but the Clerk confirmed the same; whereupon the South and Western Railroad Company assigned error and appealed to the court.

The cause was tried in the Superior Court, at September Term, 1907, and a judgment was rendered denying the right of the Johnson City Southern Railway Company to condemn the *locus in quo*. From this judgment this appeal is taken to this Court by the Johnson City Southern Railway Company.

Moore & Rollins for plaintiff.

Hudgings & Watson, J. Norment Powell and *Henry P. White* for defendants.

CONNOR, J., after stating the facts: When the cause was called for trial in the Superior Court, in term, upon defendants' exceptions to the order of the Clerk and the appeal therefrom, the plaintiff tendered certain issues not necessary to be set out. The court, being of opinion that all of said issues, except the last two, presented questions of fact to be tried by the court, declined to submit them to the jury. Plaintiff excepted. The two issues directed to the question of benefits and damages the court reserved until the preliminary questions were disposed of. In view of his Honor's judgment upon the questions of fact and law, these issues became immaterial. This constitutes plaintiff's first assignment of error. We concur in his Honor's ruling. The plaintiff, as required by section 2580, Revisal, stated in its petition that it had been duly chartered; that it was its intention in good faith to construct, finish and operate a railroad from and to the *termini* named in its charter: that its capital stock, as required by its charter, had been subscribed and the portion thereof required to entitle its organization and commencement of operation had been paid in; that it had been unable to acquire title to the lands necessary for its right of way or the easement thereon, and the reason of such inability. It must in all respects comply in its petition with the requirements of section 2580. Until this is done and these allegations are made, and, if denied, found to be true by the court, the right to exercise the right of eminent domain and condemn the right of way is not established. They may be said in a certain sense to be jurisdictional. It is elementary that statutes prescribing the method of procedure to condemn lands or easements therein are to be construed strictly. This is especially true when the right of eminent domain is conferred upon a private corporation, as distinguished from a public one, or municipality. *Railway v. Lumber Co.,* 132 N. C., 644; Lewis on Em. Dom., sec. 253; Cooley Const. Lim., 763; *Fore v. Hoke,* 48 Mo. App., 254; *Adams v. Clarkson,* 23

W. Va., 203. When these essential averments are made and denied, how shall the court (the Clerk) proceed? It is manifest that the pleadings, in this condition, do not raise "issues of fact," requiring the cause to be transferred to the civil issue docket, as required by section 529, Revisal. These preliminary questions are to be decided by the Clerk. If he finds against the petitioner upon them, he dismisses the proceeding, and, if so advised, the petitioner excepts and appeals to the Judge, who hears and decides the appeal. If the Judge affirms the Clerk, an appeal lies to this Court from his conclusions of law. If the Clerk decides the preliminary questions against the defendant, he notes exceptions and makes an order for the appointment of the jury to view the premises and assess the benefits and damages. Upon the coming in of the report, if either party so desires, he may file exceptions to the report, which will be heard as provided by section 2587, and from the judgment rendered thereon appeal to the Superior Court. The appeal takes the entire record up for review. *Hendricks v. Railroad,* 98 N. C., 431. The ruling of the Clerk, to which the defendant excepted upon the hearing before the Judge, as in this case, came up for review upon the trial. Neither party is entitled to trial by jury until the coming in of the report and after it is confirmed. *Railroad v. Newton,* 133 N. C., 132; *Railroad v. Stroud,* 132 N. C., 413; *Porter v. Armstrong,* 134 N. C., 447. The practice in this respect is well settled, and was pursued in this case in strict accordance with the statutes and the decisions of this Court. Formerly, under the statute and decisions, upon appeal neither party was entitled to trial by jury upon any of the controverted questions (*Davis v. Railroad,* 19 N. C., 431) unless the charter so provided. This has been held by a number of decisions of this Court. In several cases, as in *Railroad Co. v. Lumber Co., supra,* no objection was raised to the trial by jury. By the statute (1893, ch. 148; Revisal, sec. 2588) it was pro-

vided that, in condemnation proceedings by any railroad or by any city or town, "any person interested in the land, or the city, town, railroad or other corporation, shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the Superior Court, in term, if upon the hearing of such appeal a jury trial be demanded." This limitation upon the right to demand trial by jury clearly excludes the idea that any such right is given in respect to the questions of fact to be decided preliminary to the question of damages. In *Durham v. Riggsbee,* 141 N. C., 128, the question presented upon this exception is discussed by *Mr. Justice Brown.* Referring to the allegation that the petitioner has been unable to acquire the title, and the reason therefor: "While this is a necessary allegation of the petition, it is not an *issuable* fact for the jury to determine. The Judge was right in refusing to submit it to the jury. * * * Since the act of 1893 (Revisal, sec. 2588) the defendants had a right to demand a jury trial upon the matter of compensation." The exception cannot be sustained. The plaintiff insists that the findings of the Clerk in regard to the preliminary allegations are final. This is settled adversely to the contention by a number of decisions of this Court. *Porter v. Armstrong, supra.*

It is urged that the exceptions to the Clerk's order appointing the commissioners are not sufficiently explicit and do not raise the questions decided by the Clerk. We do not find any statute or rule of the Court requiring that any specific exceptions be made to the Clerk's orders in the progress of the proceedings. Either party may except generally and, upon appeal, present any question appearing upon the record. This right, of course, is dependent upon proper denials of the matters alleged in the petition. The defendant, in addition to its general exception, makes a specific exception: "That the land described in the plaintiff's petition is not the subject of condemnation, as it is needed for defendant's road," etc. His

Honor proceeded to hear the testimony relating to the preliminary questions, upon the settlement of which petitioner's right to maintain the proceedings depended. A number of exceptions were noted to his Honor's ruling upon objections to the admissibility of testimony and assigned for error. They are not, however, referred to or discussed in the brief, and, under the rule of this Court, are taken to be abandoned. Rule 34, 140 N. C., 666.

"Upon the close of the evidence the plaintiff offered to submit to nonsuit, and asked that judgment of nonsuit be entered, to which the defendant objects. The court, being of opinion that in this action the plaintiff is not entitled to nonsuit, overruled the motion, and the plaintiff excepts." That we may pass intelligently upon this novel question it is necessary to state a few facts in the record. The South and Western Railway Company, a domestic corporation, authorized by its charter to construct a railroad from Marion, in McDowell County, to the Tennessee line, at a point near Johnson City, was, prior to 1 December, 1905, in good faith, constructing said road, and had already built from Johnson City to Spruce Pine, in North Carolina, and was operating the same. This line ran along the east bank of the Toe River and opposite the *locus in quo,* which lies along the west bank of said river. For the purpose of getting a better grade and one to correspond to the grade of its line already constructed, the South and Western Railroad Company determined to change its line from the east to the west bank of the river, and, before the plaintiff entered upon the *locus in quo*, obtained options on the lands over which the line in dispute would pass, and on 1 November, 1905, commenced a survey of said lines from south to north, staking the line and cutting out the undergrowth. On 1 December, 1905, defendant company was duly chartered and organized, pursuant to the laws of this State, and on that day the engineer of the South and Western Railroad Company presented to the directors a profile and report, which was

duly approved and adopted by said directors, who located the right of way set out and described in its answer, it being the line in dispute. Thereafter, and in pursuance of a previous agreement, the said railway company conveyed to the defendant railroad company all of its rights and properties of every kind in Yancey and Mitchell counties. Defendant railroad company in good faith organized for the purpose of constructing and operating a railroad according to the provisions of its charter, and was, when stopped by the order of the Clerk in this proceeding, engaged in constructing its line over the *locus in quo*. On 16 June, 1905, the plaintiff was duly incorporated and organized, with authority to construct and operate a railroad from Marion, N. C., to some point on the Tennessee line near Johnson City. On or about 25 November, 1905, an assistant engineer in the employment of the Southern Railway Company and paid by it, without any authority from the board of directors of the plaintiff company, entered upon the *locus in quo* and surveyed the line claimed by the plaintiff, which crosses and interferes with the line claimed by defendant in a large number of places. On 27 December, 1905, W. H. Wells, the chief engineer of plaintiff company, made a report of said survey to the board of directors of said company, and the line claimed by plaintiff was adopted and located. The petition herein was filed in the office of the Clerk of the Superior Court of Yadkin County, 15 December, 1905. The return day of the summons was 4 January, 1906, when the defendant filed its answer to the petition. The hearing was continued, by consent, until 19 January, 1906. On 9 January, 1906, pursuant to notice, the plaintiff made a motion before the Clerk to be allowed to file a bond, to "the end that the plaintiff, Johnson City Southern Railway Company, be allowed, authorized and empowered to hold exclusive possession of all the pieces, parcels or tracts of land in dispute between the parties in the above-entitled cause, and to hold the same with-

out molestation or interference from defendant, South and Western Railroad Company, its agents or employees, until the final termination of the above-stated proceedings." This notice was served on 8 January, 1906. On 9 January, 1906, the Clerk granted the motion and made an order that, upon filing a bond in the sum of $1,000, "the plaintiff is hereby allowed, authorized and empowered to take exclusive possession of the lands described in the petition in this cause." To this order defendant filed exceptions and appealed, but did not prosecute its appeal. The bond was filed. On 19 January, 1906, the Clerk, having refused to grant a continuance upon defendant's motion, made an order appointing commissioners of appraisal, etc., in accordance with the prayer of petition. He directed that they meet on the premises on 22 January, 1906, and condemn the right of way over the lands, assess the damages, etc. To this order defendant filed exceptions and appealed. On 24 January, 1906, the commissioners made their report to the Clerk, assessing the damages on the several tracts of land described in the petition, etc. To this report defendant filed exceptions. On 6 March, 1906, the Clerk confirmed the report. The defendant filed exceptions and appealed to the Superior Court. The plaintiff paid into court the amount assessed as damages.

These facts were before his Honor when, after hearing the evidence, plaintiff proposed to take judgment of nonsuit. It will be observed that a surveyor of another corporation made a survey of the land, and, in some way not very clearly stated, plaintiff entered and began work on the land. It does not allege in its petition that it was in possession. The order of the Clerk of 9 January, 1906, placed plaintiff in the exclusive possession of the entire land and enjoined defendant from interfering therewith. Whether or not this order was erroneous, as it seems to us it was, the plaintiff, from and after its date, was in possession under and by virtue of it. It is the uniform practice and the usual procedure in civil

actions that, at term time, before verdict, the plaintiff may, if defendant has not set up any counterclaim or shown in the pleadings any right to affirmative relief, submit to judgment of nonsuit. This is elementary. Prior to the introduction of the Code practice there was no reason why the plaintiff might not retire from court by paying the cost. The only pleading open to defendant was the general issue or by way of confession and avoidance, in either case resulting, if established, in defeating the plaintiff's action. In equity a different practice prevailed. The complainant was entitled, with the consent of the Chancellor, to withdraw his bill, provided no decree or decretal order had been made by which the defendant acquired the right to have the entire matter brought into controversy settled. In *Purnell v. Vaughan,* 80 N. C., 46, *Smith, C. J.,* quoting Daniel Ch. Prac., 930: "After a decree, however, the court will not suffer a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it." *Chancellor Walworth,* in *Wate v. Crawford,* 11 Paige, ch. 470: "Before any decree or decretal order has been made in a suit in chancery, by which a defendant has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs. But after a decree has been made, etc., the bill cannot be dismissed without destroying these rights." In *Purnell's case* the court had acted, suspended the sale by the mortgagee, ordered a reference for an account, etc. The motion by plaintiff to dismiss his action was denied. The same question arose in *Bynum v. Powe,* 97 N. C., 374, in which *Merrimon, J.,* said: "Under the present method of civil procedure there is but one form of action, and the plaintiff, as indicated above, may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of nonsuit, except that in cases purely equitable in their nature he cannot do so *after the rights of the defendant in the course of the action have at-*

tached, that he has the right to have settled and concluded in the action. * * * This is reasonable, and rests upon grounds of manifest justice." *Gatewood v. Leak,* 99 N. C., 363. In *Boyle v. Stallings,* 140 N. C., 524, we held that plaintiff was not entitled to dismiss his action after an account had been taken and exceptions filed. In *Bank v. Rose,* 19 S. C. (Rich Eq.), 292, *Harper, Ch.,* says: "The exception, stated in general terms, is that it is within the discretion of the court to refuse him permission to do so if the dismissal would work a prejudice to the other parties." He further says that, if the dismissal would put the "defendant to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted." In *Connor v. Drake,* 1 Ohio St., 166, it is said: "The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both the parties, the defendant and the complainant. After a defendant has been put to trouble and expense in making his defense, if, *in the progress of the case,* rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the plaintiff might come to the conclusion that it would be for his interest to dismiss his bill. Such a mode of proceeding would be trifling with the court, as well as the rights of defendants." It has been repeatedly held that a proceeding for condemnation is a "special proceeding" and not a "civil action." *Sumner v. Miller,* 64 N. C., 688; *Railroad v. Lumber Co.,* 132 N. C., 644; Clark's Code, p. 10. In many respects the proceeding, unless otherwise prescribed by statute, is assimilated to that prevailing in courts of equity. The facts found by his Honor and apparent upon the record clearly demonstrate the wisdom of the refusal to permit the plaintiff to submit to a judgment of nonsuit.

Conceding that, as found by the Clerk, both parties were

in possession of the *locus in quo* on 9 January, 1906, we think it is very doubtful whether, under section 2595, Revisal, the Clerk had the power at that stage of the proceeding to make the order ousting defendant and giving plaintiff the exclusive possession. Conceding, however, that, although erroneous, the order was efficient, as it appears to have been, the plaintiff was, from and after filing the bond, in the exclusive possession, under and by virtue of the order of the court. The defendant not only denied the allegations in the petition in regard to the preliminary and jurisdictional matters, but expressly and by way of further answer alleged that it was engaged in constructing a road over the *locus in quo,* and that it was necessary for the prosecution of its work, etc. Thus, after passing the preliminary stages of the trial, the merits of the controversy involved the contested right of plaintiff and defendant to hold and occupy the right of way for their corporate purposes. To permit the plaintiff, after obtaining an order in the *progress of the case* giving it exclusive possession and ejecting the defendant, to take a nonsuit, leaving the *status quo* thus acquired, would be manifestly unjust, and trifling not only with the court and the defendant, but with the large and important public interests involved in having a railroad constructed, giving to the people an outlet for travel and transportation. The right of eminent domain is conferred primarily for the public welfare and to be exercised and used for that purpose and under governmental control. It cannot be that the courts will permit a private corporation, upon which is imposed duties to the public, to use this sovereign power in a manner not only harassing to the citizen, but preventing other corporations having similar duties and rights from exercising them.

We concur with his Honor in refusing the motion: First, because the defendant had acquired rights "in the course of the action" of which it could not be deprived in this way. As said by *Smith, C. J.,* in *Purnell v. Vaughan, supra,* "He

who comes into a court of equity must himself do equity, and the plaintiff cannot be allowed, after taking the advantages derived from his action, by putting an end to it to deprive the defendants of the advantages to which they are entitled." Second, the defendant, having in its answer set up new matter involving its rights to the exclusive occupation of the *locus in quo* for its corporate purposes, was entitled to have its claim adjudged and settled. Both corporations were claiming the right to construct a railroad connecting the coal fields with the cities of the seaboard. They allege that very large sums of money have been invested, and larger sums, awaiting the termination of this controversy, are for investment in the construction of this important line of railroad. It is not of so much interest to the public which of two corporations build the road as it is that, by using the courts in the way suggested, they prevent either from doing so. If the course proposed by the plaintiff be permitted, the State has granted her franchise, with its sovereign power, to her own hindrance. If in creating two corporations she has conferred power upon both by which, through the instrumentality of her own courts, the building of railroads may be retarded, if not ultimately defeated, and her mountain fastnesses remain locked in their primitive isolation, the Legislature may well consider whether some restriction should not be put upon corporations enjoying such power. If the course proposed by plaintiff be permitted, railroad building may be "tied up" indefinitely by repeatedly renewed condemnation proceedings, contested until the end has been reached, and then withdrawn, only to be repeated in another form. Corporations cannot, unless by express power conferred by the Legislature, be permitted to so use the right of eminent domain.

His Honor proceeded to find the facts pertaining to the right of plaintiff to prosecute its petition. His judgment includes a number of findings which, while pertinent, were not necessary. We do not propose to set out or consider

those not necessary to the determination of the appeal. The findings are, of course, conclusive, unless, as insisted by plaintiff, they are not sustained by any evidence.

The tenth finding is: "That prior to the date of the verification of the petition filed in this proceeding the plaintiff made no effort to procure the right of way, either by purchase or condemnation, along any part of its projected line."

Eleventh: "That at no time has the plaintiff made any effort to procure, in any way, any right of way along the line mentioned in its charter, except over the *locus in quo,* and that by this proceeding."

These findings are sufficient to sustain the judgment. The evidence fully sustained his Honor's findings. Our attention is not called to any evidence to sustain the averment in the petition.

The plaintiff insists that, as defendant by its answer denies the right of plaintiff to condemn, it is relieved of the necessity of showing that it made an effort to acquire the title, and reason of failure; that it would be requiring it to do a vain thing. The allegation is required by the statute and the burden of proof is upon the plaintiff. *Railway v. Lumber Co., supra.* "In most of the States, by express provision either in the Constitution or by the statute, and in most cases by both, proceedings to condemn property cannot be instituted unless such an attempt has been made. * * * Such a provision is mandatory and not merely directory, and the condemnation proceedings are absolutely void in case no attempt is made, before beginning them, to come to an agreement with the owner." 15 Cyc., 821, 822; *Allen v. Railroad,* 102 N. C., 381. "The statute required the petition for condemnation and assessment to set forth that the parties could not agree. The petition failing to do so, the court said the averment was jurisdictional." *Fore v. Hoke,* 48 Mo. App., 254. Referring to the statutory requirement, the Court, in *Adams v. Clarksbury,* 23 W. Va., 203, said: "The conditions must

be regarded as conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceedings must show affirmatively such compliance." *Madden v. L. & N. Railroad,* 66 Miss., 258; *Mitchell v. Railroad,* 68 Ill., 286; *Chicago & Alt. Railroad v. Smith,* 78 Ill., 96. Plaintiff relies on the decision of this Court in *Durham v. Riggsbee,* 141 N. C., 128. *Mr. Justice Brown* said in that case: "These alleged facts are tantamount to a specific allegation in the words of the statute, and plainly show an effort on the part of the petitioner's officers to come to an agreement, and the reason of their inability to do so. If the amended petition was deficient in this respect, it is greatly aided by the admissions of the answer, for that shows clearly that the petitioner made initial efforts to negotiate and the defendant declined to do so." We find nothing in this language indicating a departure from the former decisions of this Court and the uniform current of authority elsewhere. In the petition filed by plaintiff herein it is alleged that the reason it could not acquire the title "was the failure to agree with the said owners, and those claiming an interest therein, as to the value of the same." We do not find any evidence tending to show any effort to agree with the owners in any respect. The whole evidence shows a purpose to get a location and proceed with the work. This is not permissible, under our conception of the property rights of the citizen. The plaintiff does not in its brief direct our attention to any evidence, either offered or admitted, tending to sustain the jurisdictional averment. While there is no specific assignment of error to his Honor's finding of fact, we have examined the record in that respect. His Honor also finds that plaintiff did not in good faith intend to construct a railroad over the line in controversy, but was incorporated for the purpose of hindering, delaying and obstructing the building of a railroad along the *locus in quo* by the South and

Western Railway Company, which was in good faith constructing a railroad from Johnson City, in the State of Tennessee, to Spruce Pine, in North Carolina, and was operating the same. This line ran along the east bank of the Toe River and opposite the *locus in quo*, which lies along the west bank of the river.

"In order to obtain a better grade and one to correspond to the grade of its line already constructed and that was in progress of construction, the South and Western Railway Company determined to change its line from the east to the west bank of said river, and, before the employees of plaintiff company or of the Southern Railway Company entered upon the *locus in quo*, obtained options on the lands over which the line in dispute would pass, and on 21 November, 1905, commenced a survey of said line from south to north, staking the line and cutting out the undergrowth along the line, until 25 November, 1905, when these surveyors met a party of surveyors employed and paid by the Southern Railway Company, who had commenced to survey said line from its northern terminus. This meeting was about 1,500 feet from the *locus in quo*. Maps and profile of the survey were made.

"On 1 December, 1905, the defendant obtained a charter, under the provisions of the Revised Code of North Carolina, and on that day duly organized the defendant company at Spruce Pine, in Mitchell County, North Carolina, and at said time and place the engineer of the South and Western Railway Company presented to the directors of the defendant company, in the meeting there and then assembled, the said maps and profile and report of said engineer, which said report, maps and profile were duly approved, and the said directors then and there adopted and located the right of way set out and described and claimed by defendant company in its answer, it being the line in dispute in this action.

"The defendant company was in good faith organized for the purpose of constructing and operating a railroad accord-

ing to the provisions of its charter, and was, when stopped by the order of the Clerk in this proceeding, engaged in constructing its line over the *locus in quo*, and since that time has been and is actively engaged on other parts of its line in constructing a roadbed of the best quality and of unusually low grades and few curves.

"On 24 December, 1906, in pursuance of a previous agreement, the South and Western Railway Company conveyed to defendant company all of its rights and properties of every kind in Yancey and Mitchell counties, which conveyance was registered in Yancey County 31 December, 1906.

"It is impracticable to construct and run the two lines on the *locus in quo*."

There was evidence to sustain the findings. We find no reason for disturbing them. The profile filed with the transcript shows that the *locus in quo* is situate on the banks of the Toe (or Nolachucky) River, which runs through a narrow mountain gorge, the mountains being very high and almost perpendicular. There was, of course, a difference of opinion between the engineers in respect to this question. We think it very doubtful, upon the testimony and findings by his Honor, whether plaintiff has located its proposed line of track in accordance with the principles laid down in *Fayetteville Street Railway v. Railroad*, 142 N. C., 423, in which the question is discussed by *Mr. Justice Hoke*.

We have not referred to the large number of exceptions in the record and assignments of error in regard to his Honor's ruling upon the admissibility of testimony. They are not discussed in the brief nor do they appear to be relevant to the substantial merits of the controversy. Upon a careful examination of the entire record, we find no error in his Honor's conclusions of law or judgment, "That the order of the Clerk appealed from be and the same is hereby reversed, vacated and set aside; that plaintiff is not and defendant company is entitled to the right of way over the *locus in quo*

described in the pleadings. It appearing to the court that, under proceedings in this cause, possession of the *locus in quo* was given to the plaintiff, and that the defendant company was stopped from work on its line on the *locus in quo,* it is further considered and ordered that the plaintiff surrender to the defendant company possession of the *locus in quo,* in order that the defendant may proceed with the work on its line over the *locus in quo;* that the $500 paid into the Clerk's office be returned to it upon demand." This judgment is affirmed. Upon the certification of the decision of this Court to the Clerk of the Superior Court of Yancey County, the Clerk will issue a writ, directed to the Sheriff of said county, to carry into effect the terms of said judgment. The question of damages upon plaintiff's bond, filed pursuant to the order of 9 January, 1906, may be assessed by a jury, or otherwise, if the parties so elect, at the next term of said court. Revisal, sec. 1542.

Affirmed.

G. McLEOD v. THE BOARD OF COMMISSIONERS OF THE TOWN OF CARTHAGE.

(Filed 25 May, 1908.)

1. **Taxation—School Districts Within Municipality—Town Commissioners—Constitutional Law.**

   An act creating a school district within the limits of a town and authorizing a vote upon the question of issuing bonds within the district prescribed, by taxation on property and polls therein, is not void by reason of a provision that the board of commissioners of the town were designated to call the election and have the usual powers incident to the issue and levy.

2. **Statutes, Interpretation of—Ambiguity—Construed as a Whole.**

   Statutes should be interpreted in accordance with that meaning which is clearly expressed, and, should there be doubt or ambiguity, the true legislative intent should be ascertained from the language used.

3. Same—Taxation—School Districts Within Municipality—Vote of the People—Constitutional Law.

An act creating by clearly expressed language a prescribed school district within the corporate limits of a town, and providing for an indebtedness and levy by taxation upon the property and polls within that district for school purposes, and in another part there are expressions to the effect that the tax so levied "shall be" for the support of schools in said town, and the purchase of land and erection of school buildings thereon "with money raised by issuing bonds of the town," as provided for, when construed as a whole, does not impose a debt upon the poll and property in the town outside of the prescribed school district, and is not, therefore, unconstitutional as being without the consent of the people living in the town beyond the school limits.

4. Legislative Powers—School District Within Municipality—Uniformity—Constitutional Law.

The Legislature may establish a separate school district within another municipality, under the provisions of Article VII, section 7, when the principle of uniformity is established, as required by section 9 of this article. (*Smith v. School Trustees*, 141 N. C., cited and approved.)

5. Same—Race Discrimination.

An act creating a school district within certain prescribed limits in the corporate limits of a town will not be held as an unconstitutional discrimination between the two races, when it appears that there are no colored children within the school district and there is no suggestion that those in the town outside the district have not been provided with ample means and facilities for their education. (*Lowry v. School Trustees*, 140 N. C., 33, cited and approved.)

ACTION heard by *Webb, J.*, at April Term, 1908, of MOORE.

This action was brought to enjoin the defendants, commissioners of the town of Carthage, from issuing and selling coupon bonds and from levying any tax to pay the same or the interest thereon, and to restrain their codefendant, the tax collector of Carthage, from collecting taxes levied by the said commissioners to pay the interest on the bonds and create a sinking fund to pay the principal at maturity. The defendants are proceeding under and by virtue of the provisions of the Private Laws of 1907, ch. 482, authorizing the creation

of a school district in the town of Carthage. The parties agreed that the Judge should find the facts and enter judgment according to his opinion upon the law. The Judge's findings of fact and conclusions of law were as follows:

1. The plaintiff is a citizen and a taxpayer of the town of Carthage and resides within the boundaries of the school district hereinafter described.

2. The General Assembly of North Carolina, at its session of 1907, passed an act to amend the charter of the town of Carthage, which was ratified 11 March, 1907, it being chapter 482 of the Private Laws of North Carolina passed at said session, to which reference is made.

3. The corporate limits of the town of Carthage were run and marked by order of the Board of Commissioners of the Town of Carthage, after the passage of said act of the General Assembly and prior to the times hereinafter mentioned in the further findings of fact herein.

4. The school territory or district described in section 54 of said act of the General Assembly lies within the boundaries of the town of Carthage, as prescribed in section 2 of said act, but does not include all the territory embraced within the corporate limits of said town, and the boundaries of said school territory or district are not coterminous with the corporate limits of said town.

5. Persons of school age reside within the corporate limits of said town, outside the boundary of the school district described in said section 54 of said act, and some of the residents of said town own property within the corporate limits of said town and outside the boundaries of said school district.

6. Persons of school age reside within the boundaries of said school district, as hereinbefore set forth.

7. Persons of the colored race, as well as persons of the white race, reside within the corporate limits of the town of Carthage and outside the boundaries of said school territory,

who are the owners of property, and some of whom are electors. That persons of school age of the colored race, as well as persons of school age of the white race, also reside within the corporate limits of the town of Carthage and outside the boundaries of said school district; that persons of the white race only reside within the boundaries of said school territory described in section 54 of the act of the General Assembly.

8. The Board of Commissioners of the Town of Carthage, at their regular meeting held in June, 1907, levied a tax for the year 1907 on all taxable property in the territory described in section 54 of said act of the General Assembly of eight cents on every one hundred dollars valuation of property and twenty-four cents on each taxable poll, for the purpose of paying the interest on the school bonds of $10,000 to be issued under the provisions of said act and pursuant to the election held thereunder, as prescribed in said act and as hereinafter set forth, and also a tax on all taxable property in said territory described in section 54 of said act of thirty-two cents on every one hundred dollars valuation of taxable property in said territory and ninety-six cents on each person subject to poll tax and residing therein, for the purpose of establishing and maintaining a public graded school in said territory, under provisions of the said act of the General Assembly and pursuant to the election held thereunder, as hereinafter set forth.

9. No tax was levied by the said board of commissioners or the authorities of the town of Carthage for school purposes or for the payment of principal and interest on said school bonds upon the taxable property within the corporate limits of the town of Carthage situated outside the territory described in section 54 of said act, nor was any poll tax levied upon persons residing outside the limits of said school territory, and it is not the purpose of said board of commissioners to levy such tax at any time upon property situated within the corporate limits and outside of said school territory.

10. At a meeting of the Board of Commissioners of the Town of Carthage, held pursuant to law, on 22 April, 1907, it was ordered by said board that an election be held, under and by virtue of said act, in the territory described in section 54 of said act, upon the question whether a tax should be annually levied and collected therein for the support and maintenance of schools in said territory and the purchase of lands for the erection of schools, buildings and fixtures thereon, and paying interest upon the coupon bonds for schools referred to in said act, and providing for a sinking fund for the payment of the same, and whether coupon bonds in the sum of $10,000 should be issued for the erection of said school buildings in said territory and equipping the same with school fixtures, as provided in said act, and said election was ordered by said board to be held in said territory on the first day of June, 1907. By the terms of said order the qualified voters in said territory who were in favor of the levy and collection of said tax and the issue of said bonds as provided in said act were to vote a written or printed ticket, without device, on which should be the words "For Schools and Bonds," and the qualified voters who were opposed to the levy and collection of such annual tax and the issue of said bonds as provided in said act should vote a written or printed ballot, "Against Schools and Bonds"; and, pursuant to said order, registrars and judges or inspectors of election were duly appointed to hold said election under the rules and regulations and laws governing the election of officers of the town of Carthage, and said election was duly advertised and ordered to be held in accordance with the provisions of said act of the General Assembly.

11. The said election was duly held, in accordance with the order of said board of commissioners and under the provisions of said act, on the day aforesaid, and at said election a majority of the qualified voters residing within said school district cast their ballots "For Schools and Bonds." Said

election was regularly and legally held, as provided by said act of the General Assembly and by order of the Board of Commissioners of the Town of Carthage, pursuant to authority conferred by said act of the General Assembly; and upon report of said registrars and judges or inspectors of election of the result of said election to the Board of Commissioners of the Town of Carthage, as provided by law, the said board found as a fact that a majority of the qualified voters residing within said school district cast their ballots at said election "For Schools and Bonds."

12. The Board of Commissioners of the Town of Carthage, pursuant to the provisions of said act and the election held thereunder pursuant to said act and the order of the board aforesaid, have advertised the sale of coupon bonds in the sum of $10,000, to be issued in accordance with the provisions of said act and pursuant to said election, for the purpose of purchasing a site and erecting school buildings and equipping the same for a graded school in the territory described in section 54 of said act, and it is the purpose of said board of commissioners to make sale of said bonds and apply the proceeds arising from said sale to the purposes specified in said act of the General Assembly.

13. The Board of Commissioners of the Town of Carthage, at a meeting held in 1907, duly appointed the defendant W. W. Baldwin tax collector of the town of Carthage, and, after he had executed a bond as provided by statute for the faithful collection of said taxes and accounting for the same, placed in his hands for collection as an execution the tax list, upon which is computed the taxes levied by the said Board of Commissioners of the Town of Carthage upon polls and property situated within said school district, for school purposes, as hereinbefore set forth, and said tax collector is now attempting to collect the taxes so levied for said purposes, to the end that said special tax be applied to pay the interest on said bonds and to create a sinking fund to pay the principal of

said bonds at maturity, and for the maintenance of said school, as set forth in the order of the board levying said tax, as provided in said act of the General Assembly and pursuant to said election held as aforesaid.

14. It is the purpose of the Board of Commissioners of the Town of Carthage, at its meeting in June, 1908, to levy another and additional tax upon the property and polls within said school district for the school purposes specified in said act of the General Assembly. That said act of the General Assembly was enacted by the General Assembly at its session of 1907, in accordance with the provisions of Article II of the Constitution of North Carolina, the particular facts with reference to the passage of the same being as are set forth in section 19 of the answer of the defendant filed herein.

15. It is not the purpose of the Board of Commissioners of the Town of Carthage to levy any tax upon the people of the colored race or the people of the white race residing within the corporate limits of said town of Carthage, outside the boundaries of said district, who own no property within the school district aforesaid, but it is the purpose of said board to levy said tax authorized by said act only upon the property within the school territory aforesaid and residents therein, in accordance with the provisions of said act and for the benefit of the people only who reside within said school territory, as set forth in said act.

Upon the foregoing facts the court adjudged and decreed:

1. That the taxes levied by the Board of Commissioners of the Town of Carthage at its meeting in June, 1907, for school purposes are valid and authorized by said act of the General Assembly and the election held pursuant thereto.

2. That the coupon bonds in the sum of $10,000 for school purposes, advertised for sale by the Board of Commissioners of the Town of Carthage, constitute a valid indebtedness against the school territory described in said act of the General Assembly of North Carolina, and are legal and valid,

and the Board of Commissioners of the Town of Carthage is duly authorized and empowered to issue said bonds as a valid indebtedness against said territory and make sale of the same, and to levy the tax authorized by said act of the General Assembly upon taxable property and polls situated in said school district for the purpose of paying the principal and interest of said bonds, as provided in said act of the General Assembly, and to levy the taxes for the maintenance of schools within said territory, as provided by said act.

3. That the defendants go without day and recover their cost of the plaintiff, to be taxed by the Clerk of this court.

The plaintiff excepted to the judgment and appealed to this Court.

W. J. Adams for plaintiff.
M. L. Spence for defendants.

Walker, J. The decision of this case turns upon what is the true meaning of chapter 482 of the Private Acts of 1907. The objection of the plaintiff to the issuing and selling of the bonds and to the levy and collection of the tax to pay the interest as it accrues, and the principal at maturity, is based upon the ground that the provisions of the act in regard to that matter are repugnant, and that, by a proper construction of the statute, rejecting certain sections thereof because they conflict with other and subsequent sections, where the intent is expressly or at least more clearly indicated, we should hold that the Legislature has authorized the issuing of bonds by the town of Carthage and the levy of a tax for the payment of the same upon residents of that town outside the limits of the school district created by the act, for the erection of a school and its maintenance within that district for the benefit of persons residing therein and to the exclusion of those residing in the town but not in said district; and this, they contend, is contrary to the provisions of the Constitution, and the act is therefore void. We are unable to admit the prem-

ises laid down by the plaintiff, even if the deduction therefrom be ever so correct. It is clear to us that the Legislature intended to establish a school district within the corporate limits of the town of Carthage and from a part of the territory of the said town for the purposes specified in the act, and that bonds should be issued, not by the town, but by the corporate authorities of the town, the board of commissioners, for and in behalf of the school district so created by the statute. It was perhaps considered more convenient and less expensive to have the board of commissioners, the treasurer and the tax collector of the town perform the several duties and functions assigned to them than to provide for the appointment or election of officers within the school district for that purpose. We can see no objection to this method of administering the affairs of the district and to the procedure adopted in order to execute the purpose the Legislature had in view. The plaintiff argues that, as in section 50 it is provided that an election shall be held to determine whether taxes shall be levied "for the support of the schools in said town provided for in this act, and the purchase of land and the erection of school buildings thereon," and, further, that the money to pay for the land and school buildings "shall only be raised by issuing the bonds of the town, as hereinafter provided for," the Legislature has attempted to impose a debt upon the people of the town residing outside the school district without their consent, for the support of the school to be established in the district, notwithstanding subsequent provisions of the act, which, we think, negative any such intention. The statute must be construed as a whole, and not by the wording of any particular section or part of it. The law requires that, in the interpretation of a statute, we should give it that meaning which is clearly expressed, and if there is doubt or ambiguity we should construe it so as to ascertain from its language what was the true intention of the Legislature. *Herring v. Dixon,* 122 N. C., 425; *Wilson v. Markley,* 133

N. C., 616; *Fortune v. Commissioners,* 140 N. C., 322; *Board of Education v. Commissioners,* 137 N. C., 312; *Lowry v. School Trustees,* 140 N. C., 40; *Spencer v. Railroad,* 137 N. C., 119. If we follow the rules of interpretation and construction as stated in the cases we have cited, we find no serious difficulty in ascertaining what is meant by this act. When the word "town" is used in section 50 it is with reference to the election which is required to be held "as provided in this act," and the election is required to be held, not in the town, but within the district. The same may be said of the expression in section 50, that the "bonds of the said town" shall be issued and sold to pay for the school buildings and site, as they are required to be issued "as hereinafter provided for." When we refer to the subsequent sections of the act, especially to section 61, we find that the commissioners of the town are directed to issue the bonds for the school district, and it also appears by the clearest intendment that the taxes are to be levied only on property and polls within the district. It was plainly the intention of the Legislature, when using the word "town," to designate only that part of it which lies inside the territory of the school district, and we think this intent appears unmistakably if we read and consider the act in its entirety. We hold that the commissioners and other officers of the town of Carthage can proceed to execute the provisions of the act in accordance with our construction thereof, and that the bonds should be issued for the school district and the taxes levied and collected in the manner prescribed therein.

The other questions raised by the plaintiff, as to the power of the Legislature to establish a separate school district within another municipality and as to the lack of uniformity of the tax, have been recently decided in *Smith v. School Trustees,* 141 N. C., 143, and require no further discussion here. The question of discrimination as between the two races is settled against the plaintiff's contention by the decision of this Court

in *Lowery v. School Trustees,* 140 N. C., 33, if such a question is presented in the case. We think it is not, as there are no colored children in the school district, and there is no suggestion that those in the town, outside the district, have not been provided with ample means and facilities for their education.

There was no error in the ruling of the Judge upon the facts as found by him, and we therefore affirm the judgment.

Affirmed.

HARPER FURNITURE COMPANY v. SOUTHERN EXPRESS COMPANY.

(Filed 29 May, 1908.)

1. Carriers of Freight—Express—Measure of Damages—Profits.

In an action against an express company for damages arising from a wrongful delay in the shipment of an engine shaft, whereby plaintiff's factory was necessarily stopped in its operation, evidence tending to show as a measure of damages the current profits is, as a general rule, incompetent.

2. Carriers of Freight—Express—Measure of Damages—Special Circumstances—Implied Notice.

When goods are shipped for a special purpose or for present use it is not always necessary that those facts should be mentioned in the negotiations, or in express terms made a part of the contract; for, when they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages in a suit against the carrier for wrongful delay, when they naturally and proximately follow from the breach of duty.

3. Same—Questions for Jury.

The plaintiff caused to be shipped to its own address by express an engine shaft weighing not less than 650 pounds, from Erie, Pa., to Lenoir, N. C. The plaintiff's name indicated its business as that of manufacturing furniture. Upon the measure of damages in a suit against the express company for wrongful delay: *Held,* (1) that the express company was fixed with implied notice of the facts and circumstances under which special

damages necessarily arose to plaintiff from the stopping of its factory on account of the delay; (*a*) the unusual shipment by express indicated urgency; (*b*) the name of the consignee indicated the purpose for which the shipment was needed; (*c*) the shaft indicated that it was necessary to the working of the engine to run the machinery, and (*d*) the size of the shaft was evidence of the power of the engine required to work the machinery; (2) the measure of damages was the interest on capital invested and unproductive for the time, and, when applicable, the pay of idle and necessarily unemployed hands, with such other expenses reasonably referable to defendant's wrong, including an outlay of plaintiff in a reasonable effort to minimize the loss; (3) the question upon the facts presented was one for the jury.

WALKER and BROWN, JJ., dissenting.

ACTION to recover damages for wrongful delay in the shipment of goods, tried before *Ward, J.*, and a jury, at November Term, 1907, of CALDWELL.

There was evidence tending to show that plaintiff was a firm engaged in the manufacture of furniture, having its mill at Lenoir, N. C.; that on or about 21 October, 1905, the Erie City Iron Works, of Erie City, Pa., shipped to plaintiff, as consignee, at Lenoir, N. C., an engine shaft, of a given kind, weighing something like 650 pounds; that pursuant to the order of plaintiff company the shipment was made by express, over a line of connecting carriers between the two points, including the defendant, and the shaft was delivered at Lenoir, N. C., by defendant company on 9 November, 1905, indicating a wrongful delay in the shipment of something like two weeks. There was further evidence tending to show that the furniture factory of plaintiff company for which the engine shaft had been ordered was necessarily closed down during the time of wrongful delay, and that by reason of this loss of time in operating the factory the plaintiff company suffered damages to the amount of $200 and more, arising from wages paid idle hands and other costs incident to the delay, and interest on the amount of capital invested in the mill and unproductive during said time. The character, capacity and amount invested in the mill were

shown as data for estimating the damage suffered, and it was proved that the full product of the mill had been already sold for the period and at a profit. It was further shown that, as soon as it was disclosed that the shipment was delayed, plaintiff company immediately duplicated the order, and both shafts were delivered at the same time, 9 November.

Plaintiff offered to show the *amount* of profit which the mill could have realized during the time of delay, but the evidence was held to be incompetent, and the plaintiff excepted. At the close of the testimony the court intimated an opinion that, on the evidence, if believed, only nominal damages could be recovered, and in deference to this intimation plaintiff submitted to a nonsuit and appealed.

Jones & Whisnant for plaintiff.
W. C. Newland for defendant.

HOKE, J., after stating the case: The decisions of this State are to the effect that the current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and the fluctuations of the market value of the product, as a general rule, are too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant, and the better rule in such cases, when it appears that substantial damages are recoverable, is that such damages shall be ascertained on the basis of interest on the capital invested which is unproductive for the time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed, and some other incidental expenses reasonably referable to the defendant's wrong, which may at times include an outlay in the reasonable effort to reduce or minimize the loss. No doubt there are cases where the average rental value of a business building or a given machine may afford data for a correct admeasurement of damages, but in plants of the kind indicated this rental value is so connected with or dependent upon the fluctuation

of the markets that it has been considered with us as the safer rule in enterprises of the kind stated to adopt the interest on the capital invested and unproductive for the time, with other incidental costs, as the correct method of adjustment. The Judge below therefore made a correct ruling in rejecting the evidence offered tending to show the current profits of the plaintiff's mill. *Lumber Co. v. Iron Works,* 130 N. C., 584; *Sharpe v. Railroad,* 130 N. C., 613; *Rocky Mount Mills v. Railroad,* 119 N. C., 693; *Foard v. Railroad,* 53 N. C., 235; *Boyle v. Reeder,* 23 N. C., 607.

We are of opinion, however, that there was error in holding that, on the facts appearing from the evidence, the plaintiff could in any event recover only nominal damages. The plaintiff complains of, and offers evidence tending to show, a breach of contract of carriage, and, as in other cases of breach of contract, it should ordinarily be allowed to recover the damages naturally incident to the breach, and which may be reasonably supposed to have been in the minds of the parties at the time the contract was made. Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. We have so held in the case of *Davidson Development Co. v. Railroad,* 147 N. C., 503, and *Lee v. Railroad,* 136 N. C., 533, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation

in making the contract, such special facts become relevant in determining the question of damages. Moore on Carriers, p. 425; Hutchinson on Carriers, sec. 1367.

In the citation from Hutchinson, after stating the general rule to be the difference in the market value of the goods, the author says: "But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which for special reasons the shipper may desire that the transportation of his goods may be hastened; and if with a knowledge of these circumstances the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time or for a given purpose, he should negligently delay them beyond that time or so as to defeat that purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner."

The same principle is well stated by *Bramley, L. J.*, in the case of *Hydraulic Co. v. McHaffie et al.*, 4 Q. B. Div., 78-79, p. 670, an action for damages for delay in constructing a machine, as follows: "The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury following from a breach of it. The wrongdoer is *prima facie* only liable for the natural and ordinary consequences of the breach; but where, at the time of entering into the contract, both parties knew and contemplated that if a breach is committed some injury will occur in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation or damages on the occurrence of the injury." This limitation on the general rule as to the amount of damages recoverable for wrongful delay in the shipment of goods, being itself an application of the third rule laid down in the case of *Hadley v. Baxendale*, Woods Mayne on Damages, p. 21, is frequently presented in cases involving the making and ship-

ment of machinery. In fact, these are the cases which usually call for the application of the principle stated. Many instances of such application are afforded in the decisions in our own State, as in *Boyle v. Reeder, supra; Foard v. Railroad, supra; Rocky Mount Mills v. Railroad, supra; Sharpe v. Railroad, supra.* See, also, *Mace v. Ramsey,* 74 N. C., 11; *Neal v. Hardware Co.,* 122 N. C., 104. And well-considered cases in other jurisdictions are to like effect: *Simpson v. Railway,* L. R. Div. 1, 75-76, p. 274; *Corey v. Iron Works,* 3 L. R., 67-68, p. 181; *Gee v. Railroad,* 6 Exch., 1860, 210; *Die Elbinger v. Armstrong,* 92 Q. B., 73-74, p. 473; *Railway v. Ragsdale,* 14 Miss., 460; *Griffin v. Clover,* 16 N. Y., 489; *Priestly v. Railroad,* 26 Ill., 205; *Railway v. Pritchard & Co.,* 77 Ga., 412.

In *Simpson's case, supra,* it appeared that plaintiff, a manufacturer of cattle-spice and other substances, was in the habit of making an exhibit of samples of his goods in the grounds of certain cattle shows going on in different sections of the country. On the trial, before *Cockburn, C. J.,* at Spring Assizes, 1875, it was proved: "On the 18th of July, the Bedford show being about to end, and a similar show at Newcastle being about to be held on the 22d, 23d and 24th of July, where the plaintiff desired to exhibit his goods, the plaintiff, by his son, who was in charge of the show tent and samples, made with the defendants' agent a contract for carriage of the samples. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son, consigning the goods as 'boxes of sundries' to 'Simpson & Co., the show ground, Newcastle-on-Tyne,' and that he endorsed the note, 'Must be at Newcastle on Monday, certain,' meaning the next Monday, the 20th of July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle or as to the goods being samples. The goods did not arrive till several days after time and when the show was over." On the trial the undisputed damages were

paid into court, with verdict for £20 additional to cover special damages, should the court be of opinion that such damages were recoverable. Rule No. 51 argued before Q. B. Div., before *Cockburn, C. J., Mellor* and *Field, L. JJ.* The reported case proceeds as follows:

"(*Field, J.*, referred to *Watson v. Ambergate Railway Co.* [7].)

"*Gates, Q. C.*, and *C. H. Anderson,* in support of the rule. 'The argument for the plaintiff goes further than any decided case. The defendants ought to have been told that the goods were samples. *Woodger v. Great Western Railway Co.* (8).'

"(*Field, J.:* 'Must we not infer as a matter of fact that notice of their being samples was given?')

"Counsel: '*Great Western Railway Co. v. Redmayne* (1) shows that distinct notice must be given.'

"(*Cockburn, C. J.:* 'Knowledge of circumstances from which the purpose would naturally be inferred is sufficient without express notice of the purpose itself.')

"Counsel: 'As to the loss of profits, such profits as these have never been held recoverable.'

"(*Cockburn, C. J.:* 'Can it be disputed that these profits would have been recoverable if an express stipulation had been made that the goods should be delivered by a particular day and the defendants had been told what the result of non-delivery would be?')

"Counsel: 'That might be disputed.'

"*Cockburn, C. J.:* 'I am of opinion that this rule must be discharged. The law as it is to be found in the reported cases has fluctuated; but the principle is now settled that, whenever either the object of the sender is especially brought to the notice of the carrier or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. The plain-

tiff in the present case is in the habit of going about the country exhibiting his cattle-spice at shows to attract purchasers. The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line, and their agent must have known that the plaintiff had been exhibiting these goods and that they were being sent to Newcastle for the same purpose. I therefore cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.'

"*Mellor, J.*: 'I am of the same opinion. As a juryman I come to the same conclusion that the clerk of the defendants had notice of the object for which the goods were being sent. As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves.'

"*Field, J.*: 'I am of the same opinion. I apprehend that for a breach of contract a plaintiff is entitled to recover for damages naturally following under circumstances known to both the parties. In this case, inasmuch as railway companies do not often bind themselves to deliver by a particular day, the defendants' attention would be attracted by the stipulation which was made to that effect. Then, where was the contract made? Upon a show ground. To what place was it the goods were to be sent? To a similar show ground. The inference from which would naturally be that the goods were being sent for the purpose of being shown there. Further, if the defendants' agent did not so understand the matter, he might have been called to say so, but that was not done. Therefore I infer, as judge of fact, that both parties were aware of the circumstances with a view to which the plaintiff was contracting, and that they were made the basis of the contract.'"

In the case of *Gee v. Railway, supra,* shipment of cotton for use in a mill, special damages were disallowed, but the Court held that, if it had appeared that defendant had knowledge of the purpose for which the cotton was required, and that stopping the mill would follow from delay, the special damages could be recovered.

In *Priestly's case, supra,* damages were allowed for the use of machinery during the time it was wrongfully delayed in shipment. On the trial below only nominal damages had been allowed. On appeal, *Breese, J.*, for the appellate Court, said: "The principle announced by the court in its instruction, and which determined the case, the jury finding nominal damages only, is not the law. The proposition cannot be entertained for a moment that, under a contract to deliver in a reasonable time valuable machinery, such as described in the declaration, the difference in the market value of such machinery at the time it was in fact delivered and when it should have been delivered is all the damage the owner of the machinery is entitled to claim. If this was the measure there could be no great incentive to carriers to perform promptly a contract for the delivery of such articles, as they are not liable to deteriorate in a few days or months. As to perishable articles of fluctuating value, as grain, live stock and such like, this rule is doubtless the true one, and has been recognized by this Court in the case of *Sangamon and Morgan County Railroad Co. v. Henry,* 14 Ill., 156. Where the property to be carried and delivered is not of a perishable nature and is not a common or ordinary object of sale in market and subject to its fluctuations, but is designed for a special purpose in a special business, the rule is very different; but in both cases adequate indemnity should be offered the plaintiff for the loss he has sustained."

In *Railway v. Pritchard, supra,* damages were allowed for injury caused by wrongful delay in shipping a still worm for a turpentine distillery. The elements of damages

recovered in this case are thus stated in the opinion: "During all the time (of the delay) their machinery and the hands employed in running it were idle, and the tree boxes from which the crude gum was gathered had run over and much of it was wasted for the want of barrels in which to deposit it, and such loss would not have occurred had the worm come to hand at the proper time and the plaintiff been enabled to use the still. The principal loss was in the crude turpentine, estimated at eighty-six barrels, worth $4 per barrel. There was a verdict for the entire amount of damages, less $16."

In *Ragsdale's case, supra,* wrongful delay in shipping a boiler required for the operation of certain machinery, profits of the enterprise were disallowed as a proper basis of damages, and it was held that the cost of hands necessarily kept unemployed by reason of delay, with interest on capital unproductive for the time, was the correct rule for award of the damages.

And in the case of our own Court (*Neal v. Hardware Co., supra*) damages were allowed for loss of a tobacco crop, on failure to furnish, as per contract, at the stipulated time, certain flues to use in curing tobacco. It was contended that no special damages could be recovered, inasmuch as plaintiff failed to show that defendant had knowledge that such damages would result from a failure to deliver the flues. But the Court held that it was a matter of common knowledge in localities where tobacco is cultivated that if it is not cut and cured in apt time serious loss is the necessary consequence, and such knowledge would be assumed against defendant engaged in manufacturing the flues and his agent engaged in selling the same. A proper application of the doctrine declared and approved by these authorities will establish the position that, on the facts appearing in evidence, if the defendant's responsibility for this delay should be established, the plaintiff is entitled to recover compensatory damages, and

the question of the amount should be referred to the jury, on the principles heretofore indicated.

The plaintiffs were a firm engaged in the manufacture and sale of furniture; of this the title of the firm, consignee in the bill of lading, taken in connection with the character of the implement ordered and shipped, would give reasonable notice. In this day and time certainly it is a matter of common knowledge that an engine shaft is the part by which the power of the engine is applied to the operating machinery; that it is essential and necessary for the purpose, and without it the engine itself and the machinery dependent upon it are for the time out of action. The kind and size and weight of the shaft would give notice of at least the maximum capacity of the engine. As we said on the former appeal of this cause, "We may safely assume that the express companies are agencies organized for the purpose, at a higher price, of providing greater security and dispatch in the delivery of freight." And it would assuredly occur to any and every one that a shaft consisting of a piece of metal weighing not less than 650 pounds, which under ordinary circumstances could and would be shipped with perfect safety and at a much lower charge by railway, would not have been shipped in this unusual way and at a much higher price unless the call was urgent and some unusual result would follow by reason of delay. The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment, and require that amount of plaintiff's damages should be considered and determined by the jury in that aspect of the matter.

It is not practicable within the compass of this opinion, already extended to an undesirable length, to refer to the numerous authorities relied upon to sustain the defendant's position. There is no substantial difference in the general principles established by any of these decisions, and the ques-

tion of ever-recurring perplexity for the courts is the correct application of these principles to the varying facts of the different cases. To illustrate: In *Manufacturing Co. v. Railway*, 62 Wis., p. 642, where special damages were disallowed for delay in shipping a machine, for the reason that the machine was designed for present use and for a purpose that would afford data for allowance of such damage, there was not only no evidence indicating knowledge on the part of the carrier of the special purpose alleged to have caused the loss, but there was testimony tending to show notice of an entirely different purpose. *Cole, C. J.*, in delivering the opinion disallowing the claim, said: "The defendant certainly had no notice of the business in which the plaintiff was engaged, and did not know that this machine had been procured for fitting pipe and making nipples. Should we presume, as we have no right to do, that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use."

As we have endeavored to show in the case before us, the style and title of the plaintiff firm, taken in connection with the nature and description of the implement ordered, together with the unusual mode by which the shipment was provided for, and the nature of defendant's business, by which it undertook for a greater wage to give additional assurance, both of safety and dispatch, all give notice that damages beyond the ordinary amount might be reasonably expected in case there was delay, in breach of defendant's contract. So in the case of *Sawmill Co. v. Nettleship*, shipment of a lot of machinery from Liverpool to Vancouver's Island. The machinery was in different boxes, and one of these, containing a portion of the machinery, was lost, preventing operations until it could be replaced by sending to England for another piece, causing a delay in operations for something like twelve months. Damages for cost of procuring another piece were allowed, including cost of additional

freight, but profits during the period of delay were disallowed. This was put in part on the fact that the machinery was boxed and the carrier had no knowledge of the relative importance of that contained in the box lost, or that stopping of the mill would likely follow from such loss. Some stress was laid, too, on the fact that, owing to the length and uncertainty of a voyage of that kind, it would be unreasonable to suppose that the parties, in that mode of shipment, contemplated that the additional damages could be recovered; and the case, in both of these respects suggested, is clearly distinguished from the one we are considering.

We are not inadvertent to the fact that, in the case of *Hadley v. Baxendale* itself, the implement was the crank shaft of an engine, for lack of which the plaintiff's mill was stopped for the time. Without adverting to the distinctions that could be suggested between the two cases, it may be observed that this great case is important rather as laying down the general principles by which damages for breach of contract may be correctly ascertained than as a decision on the facts of the particular case. In evidence of this it may be noted that as a matter of fact the proof showed that defendant's clerk was notified that plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the Judges does not appear; possibly because the notice referred to was given the day before the shaft was delivered for shipment, which is not, it seems, a very satisfactory explanation. While this does not at all impair the value of the case as making notable declaration of the general rules applicable to such causes, it does perhaps weaken it to some extent as a decision on any given state of facts. In any event, we are of opinion that, on the facts presented here, the case comes within the third rule of *Hadley v. Baxendale*, "That where the special circumstances are known or have been communicated to the person who breaks the contract, and where the damages complained of flow naturally from the

breach of contract under those special circumstances, then such special damages must be supposed to have been contemplated by the parties to the contract and are recoverable."

It may be well to note that the cases of *Foard v. Railroad* and *Sharpe v. Railroad, supra,* go farther perhaps than the facts as they are made to appear in the cases on appeal would seem to justify in holding the carrier liable for unusual damages by reason of special circumstances; certainly they go much farther than is required to support the disposition we make of the present appeal. It is more than likely, as the question chiefly presented in those appeals was as to the correct rule for ascertaining compensatory damages as between current profits and interest on the amount of capital unemployed, that some of the evidence tending to fix the carrier with notice was omitted, as no point was made as to notice. This is certainly true in the case of *Rocky Mount Mills v. Railroad, supra.* The writer presided at that trial, and there was evidence, both direct and from the character and quality of machinery shipped, tending to show notice, and it was omitted in the statement of case on appeal for the reason suggested, that no point as to notice was made on the trial.

On the former appeal of this cause (144 N. C., 639) we held that there was evidence to be considered by the jury on the issue as to defendant's responsibility; and in this appeal we hold, in case such responsibility is properly and correctly established, that on the testimony there is evidence which requires that the question of the amount of compensatory damages shall be referred to the jury, and there was error in the ruling that, on the facts as they now appear, only nominal damages can be recovered.

Judgment below reversed and new trial awarded.

New Trial.

WALKER and BROWN, JJ., dissenting. Dissenting opinion to be filed as of this term.

T. F. WRENN v. J. L. MORGAN AND W. A. CONLEY.

(Filed 29 May, 1908.)

1. **Contracts—Counterclaim—Express Warranty.**

When, in an action to enforce collection of a note given for the purchase price of property, a defense is made by the way of counterclaim based upon the ground of false representations, and not to set the transaction aside for mistake, it is required, to sustain the counterclaim, that defendant should establish that the trade was induced by false and fraudulent representations, reasonably relied on by defendant, or that there was a breach of a warranty given in the contract of sale.

2. **Same — Measure of Damages — Value of Shares — Questions for Jury.**

W., M. and C. owned all the shares of stock in a manufacturing corporation, of which W. had the general management. After some bargaining between W. on the one hand and M. and C. on the other, the latter agreed for a certain price to buy the stock of the former, and gave their note for it. Upon this note suit was brought by W., and M. and C. set up by way of counterclaim a demand for damages for breach of warranty. There was evidence that W. furnished or caused to be furnished to M. and C. a statement, corroborated by the books, that the indebtedness of the company was in a certain sum, but in fact it was much greater, and could not have been known or ascertained by M. and C. until after the close of the transaction. There was no evidence of fraudulent intent on the part of W.: *Held*, (1) that it is not necessary that a warranty be made in express terms, and that an affirmation of a material fact intended and relied upon as an inducement to the trade may be sufficient; (2) there was evidence sufficient to go to the jury upon the question of express warranty; (3) the measure of damages was not the difference between the represented and actual indebtedness, but only as it affected the value of the stock bought.

CONNOR, J., dissenting.

ACTION to recover on a note for $6,000 and interest, given by defendants to plaintiff for one-third interest in a furniture factory which plaintiff and defendants had owned in common, in equal proportion, tried before *Peebles, J.*, and a jury, at September Term, 1907, of McDOWELL.

Defendants, admitting the execution of the note, set up by way of counterclaim a demand for damages for false and fraudulent representations of the plaintiff as to the amount of the company's indebtedness at the time of the trade, and for breach of warranty as to such indebtedness. At the close of the testimony the court held, in effect, that, if the evidence was believed by the jury, the plaintiff had established his claim to the amount of the purchase note and interest, and that there was no sufficient evidence on which to submit the question of defendants' counterclaim to the jury in either aspect of the demand. Verdict and judgment for plaintiff, and defendants excepted and appealed.

Watson, Buxton & Watson and *Shepherd & Shepherd* for plaintiff.

Justice & Pless for defendants.

HOKE, J., after stating the case: It is established beyond question that there was a mistake as to the amount of the company's indebtedness existing at the time of the sale, and that the trade by which plaintiff's interest was purchased was made on the basis of an existing indebtedness of $692.43, whereas in truth and in fact it was over $2,000, and that this excess has been paid by the defendants after they had bought out plaintiff's interest. As this, however, is not an effort on the part of defendants to set aside the sale for mistake, it is required, to sustain the counterclaim, that defendants should establish that the trade was induced by false and fraudulent representations of plaintiff, reasonably relied on by defendants, or that there was a breach of a warranty given in the contract of sale. A careful consideration of the testimony leads to the conclusion that there was no testimony of intentional deceit on the part of plaintiff, but we are of opinion that the question of whether there was a warranty given in the contract of sale should be considered and determined by the jury.

There was evidence tending to show that originally plaintiff and defendants, with one Landis, owned the factory, each having one-fourth interest, and at first the affairs of the company were managed by Landis. The owners, plaintiff and defendants, becoming dissatisfied with Landis, bought out his interest, making them the co-owners, each in one-third interest, and the management of the factory was turned over to plaintiff, who, with the approval of the others, put his cousin, Junius Wrenn, in active charge of the operations—the manufacture and sale of the furniture. Defendants, becoming dissatisfied with this management, began to treat for a purchase or sale, and some ten or eleven days before defendants bought out plaintiff's stock, for which the notes sued on were given, the plaintiff, as we interpret the evidence, supplied defendant Morgan with a written statement of the company's affairs, showing an indebtedness of $692.43; and in giving an account of the conversation when the trade was consummated between plaintiff and defendants, defendant Morgan, among other things, testified as follows: "He (Wrenn) said he would give or take $6,000. We told him if he bought one-third he would have to buy it all. We finally bought his one-third at $6,000. We bought on the statement that the company owed $692.43. I thought it was correct, and relied upon it. Bills payable were marked on the statement at $692.43. They were over $600—somewhere between two and three thousand dollars—but this did not appear on the books or the statement furnished. Creditors began to call on us, and I wrote plaintiff to come over and straighten them out."

On cross-examination, speaking to this same matter, this witness testified: "After this inventory was made out we began to negotiate to buy or sell. Mr. Wrenn offered to sell his interest for $6,500. I offered to give him $6,000. Mr. Wrenn said he would give or take $6,000 for one-third, but he would not buy two-thirds. After this, Major Conley was present, and he and I went out and talked it over, and came

back and told Mr. Wrenn that we would accept his proposition if there was no more indebtedness than the $692.43. I did not know at that time or have any suspicion that there was other indebtedness. Major Conley and I told him that we would accept his proposition. I do not remember whether we said anything to him about any more indebtedness, or a single word. I took it for granted that the statement was correct. We wrote the note to Mr. Wrenn for $6,000 and we signed it. I took it then and turned it over to Mr. Wrenn when Mr. Wrenn delivered me the stock. I passed Mr. Wrenn's office and we exchanged papers."

There was also testimony to the effect that before the trade an inventory had been taken of the assets and debts, the manager, Mr. Ernest Wrenn, and defendants' bookkeeper taking part in this, but this additional indebtedness not appearing on the books and nothing being said about it, defendants had no means of finding out about it till after the trade. The testimony of plaintiff tended to contradict that of defendants in many material respects, but, as the counterclaim was virtually dismissed as on a nonsuit, only that making for defendants' claim is set out. *Hopkins v. Railroad,* 131 N. C., 464.

It is accepted law that to hold a bargainor in a sale responsible for a warranty it is not necessary that this should be given in express terms, but that an affirmation of a material fact, made by a seller at the time of the sale and as an inducement thereto and accepted and relied on by the buyer, will amount to a warranty. Tiffany on Sales, 162; *McKinnon v. McIntosh,* 98 N. C., 89; *Horton v. Greene,* 66 N. C., 596. In *McKinnon v. McIntosh, supra, Davis, J.,* delivering the opinion of the Court, said: "If the vendor represents an article as possessing a value which, upon proof, it does not possess, he is liable as on a warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact, upon which the

purchaser acts, and this is a question for the jury. *Thompson v. Tate,* 5 N. C., 97; *Inge v. Bond,* 10 N. C., 101; *Foggert v. Blackmuller,* 26 N. C., 238; *Bell v. Jeffrey,* 35 N. C., 356; *Henson v. King,* 48 N. C., 419; *Lewis v. Rountree,* 78 N. C., 323; *Baum v. Stevens,* 24 N. C., 411."

And in *Horton's case* words of *Chief Justice Ruffin* on this subject are cited with approval, as follows: "Of necessity, in verbal contracts greater latitude must be allowed to evidence to establish the words and the meaning of parties. The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied on what was passing as a stipulation. Among these circumstances, even the tones, looks, gestures and the whole manner of the transaction, with all the surroundings, would be competent evidence for the jury to consider in making up their verdict."

Applying the doctrine as stated by these authorities, we hold that on the evidence the defendants should have been allowed to go to the jury on the question of express warranty. Defendant testified on his examination in chief that he bought on a statement supplied him by plaintiff, to whom the parties had turned over the management of the factory, that the indebtedness of the company at the time was $692.43. And again he said, in speaking of the bargain itself: "We bought on the statement that the company owed $692.43." And on cross-examination he said: "We told Wrenn that we would accept his proposition if there was no more indebtedness than the $692.43." True, the witness apparently qualifies this statement later, and may have intended to withdraw it, but the Court cannot declare this to be the case from the evidence as it now appears. If, as an inducement to the trade and intending it to be the basis of the same, the plaintiff furnished or caused to be furnished to defendants a statement showing the indebtedness at $692.43, and defendants reasonably ac-

cepted and relied and acted upon it, or if in the course of the bargain between them the plaintiff made that statement as an inducement to the trade, or it was made to him by defendants and he acquiesced in it under circumstances that by fair intendment amounted to a positive affirmation of that as a fact, and if same was accepted and relied upon by defendants, it would constitute a warranty, and this question on the testimony should be left to the jury.

If the breach of warranty is established in this connection, defendants are entitled to recover compensatory damages, as held in *Blacknall v. Rowland*, 116 N. C., 389, reaffirmed on petition to rehear in 118 N. C., 418. We do not think, however, as contended by defendants, that the question of damages would be the entire amount of the difference in the indebtedness. The plaintiff's stock was the subject-matter of sale, and the warranty is to be considered in reference to its effect upon that, and, if a breach of warranty is established, the damages would be correctly admeasured by the effect the difference in the indebtedness had on the value of plaintiff's stock which was sold to defendants.

For the error pointed out there will be a new trial, and it is so ordered.

New Trial.

H. M. VICTOR v. LOUISE MILLS, J. R. WILSON AND TRAVELERS INSURANCE COMPANY.*

(Filed 29 May, 1908.)

1. **Pleadings—Act of Corporation Alleged—Directors.**

When it is alleged in the complaint and admitted in the answer that the wrong complained of was caused by the act of the corporation, no question is presented of an excess of power exercised by the board of directors.

2. **Corporations — No Right to Insure Officers — Presumption of Powers.**

A corporation formed for the purpose of manufacturing cotton goods has no power to insure the life of its president for its benefit and pay the premiums, in the absence of express legislative provisions therefor, and the presumption is against such power.

3. **Same—Stockholders—Injunction.**

When it appears that a corporation engaged in manufacturing cotton goods has taken out and carried insurance on the life of its president for its benefit, on account of the peculiar value of his services, and his relationship with the company has ceased, a stockholder may enjoin the further payment by the corporation of premiums on the policy.

ACTION heard upon pleadings by *Moore, J.*, at March Term, 1908, of MECKLENBURG.

The plaintiff, a stockholder in the Louise Cotton Mills, a corporation chartered, organized and operating pursuant to the laws of North Carolina, seeks in this action to enjoin the board of directors and managing officers of said corporation from paying to the defendant insurance company the amount of premiums on certain insurance policies. The complaint sets out the facts relied upon for the relief demanded. The several answers of the defendants admit the material allegations and set up certain facts relevant to the controversy. Plaintiff demurs to the answer. The case was decided by his Honor upon the questions of the law thus presented by the pleadings. He overruled the demurrer, giving plaintiff time to reply. From this judgment plaintiff appealed.

*BROWN, J., did not sit upon the hearing of this case.

F. M. Redd and *F. M. Simmons* for plaintiff.

Winston & Bryant and *Tillett & Guthrie* for defendants.

CONNOR, J., after stating the facts: Eliminating all formal and irrelevant matter, we extract from the pleadings the following facts: The defendant cotton mills is, and was prior to 1 June, 1905, chartered and organized in the city of Charlotte, with a capital stock of $300,000, two-thirds of which is common and one-third preferred stock. Plaintiff is the owner of ten shares of common stock in said corporation. On and before said date the said corporation was, in accordance with its charter, operating a mill and machinery for the purpose of manufacturing cotton goods. On 30 June, 1905, the defendant Wilson was, and had for several years prior thereto been, the president of said corporation, and continued so to be until he resigned, on 2 October, 1906, since which time he has had no connection with said mills. Said Wilson was at the time of his connection with said mills "a manufacturer and financier of great capacity, skill and ability. The services which said Wilson performed for defendant mills during the whole time he occupied the position of its president were of great and peculiar value and of great benefit and advantage to the defendant and its stockholders, including the plaintiff, and such services as could be performed by the said Wilson only. On 30 June, 1905, the said J. P. Wilson, at the instance and request of the Louise Mills, made application for an insurance policy upon his life in the said Travelers Insurance Company for the sum of $100,000, for the benefit of the Louise Mills, under a plan of insurance known as "twenty-payment life." Two policies, No. 157589 and No. 157590, were issued in accordance with said application, for $50,000 each, and were made payable to the executors or administrators or assigns of J. P. Wilson, and the same were immediately after their delivery assigned by him to the Louise Mills, and said Louise Mills paid the first and all subsequent premiums thereon, and the said policies are now in force, if the same are

or ever were valid insurance contracts, and the next premium for the current year will be due thereon on 7 July, 1908. The said Louise Mills has already paid upon said policies the sum of $13,926, consisting of the premiums due for the years 1905, 1906 and 1907, which were $2,321 a year on each policy. The plaintiff has made demand upon the said Louise Mills, its officers and directors that it and they cease and desist from any further payment of the funds of the corporation on account of said premiums.

The defendants, on the contrary, insist that the corporation had an insurable interest in the life of Mr. Wilson when the policy was obtained, and it being at that time and under the existing conditions a valid contract of insurance, it remains so, notwithstanding his resignation as president of the corporation.

The defendant mills denies that the payment of the premiums from the funds of the corporation is an unwarranted diversion of such funds. The plaintiff's contention and application for injunctive relief are based upon two propositions:

1. That the amounts paid for premiums is an unauthorized and improper application or diversion of the funds of the corporation.

2. That the corporation has no insurable interest in the life of the defendant Wilson; that the policy is for that reason a gambling contract and therefore invalid; that upon the death of said Wilson its payment cannot be enforced in the courts of the State.

It is alleged and admitted that it is customary for corporations to insure the lives of their officers whose services are of peculiar value and whose death would impair the value of their stock. The extent of this custom is not alleged. In the view which we take of the question involved, it is not material. If the question of the personal liability of directors, in which the *bona fides* of their conduct was material,

were involved, the general custom known to and acquiesced in by the stockholders would probably be material. We notice that the pleadings refer to the insurance and payments of premiums on the policy as the action of the corporation, and not of the board of directors. The complaint sets out the transaction as the act of the corporation, and the answer so admits it. The demurrer must be construed as admitting the allegation and to be construed most favorably to the defendants. We are, therefore, to deal with the question presented as calling into question the corporate act, and not involving any suggestion of an excess or abuse of power by the directors. There are, of course, many acts done by the board of directors which can be called into question only by the corporation in its capacity as a legal entity or by a stockholder conforming to the rule laid down in *Hawes v. Oakland,* 104 U. S., 450; *Merrimon v. Paving Co.,* 142 N. C., 539. If the act of the corporation be *ultra vires,* any one or more stockholders may by some appropriate method call it in question and, unless by having consented to or acquiesced in it he is barred, have relief. "As any stockholder may restrain the diversion of corporate funds for any purpose not embraced in the original purpose of the corporation, no majority, however large, can compel a stockholder to submit to any fundamental change in the business or objects of the company. A stockholder, by becoming such, contracts with the corporation that he will submit his interests to the direction and control of the proper officers of the company in carrying out the objects and purposes for which it was instituted; and the undertaking on the part of the company is that the objects and purposes of its institution shall not be changed without at least the unanimous consent of all the stockholders, and that no other responsibilities and hazards shall be imposed on the stockholders than those which grow out of the original undertaking. The right to restrain by injunction exists in a stockholder, though every other stockholder may favor the *ultra vires* acts."

2 Purdy's Beach on Corp., sec. 904. "And he may enjoin and set aside any acts which do not conform to these limits." 2 Cook on Stockholders, sec. 681; *Pickering v. Stephenson*, 14 L. R. (1870), 340; *Wiswal v. Turnpike Co.*, 5 N. C., 183; Womack Pr. Corp., 147. "It is no sufficient answer to the suit of a dissenting stockholder, in case of an *ultra vires* act, to say that no wrong or fraud was intended, or that it would benefit the corporation and be no injury to the stockholders. The fact is enough that it is *ultra vires.*" Purdy's Beach, sec. 905. In *Central Railroad v. Collins*, 40 Ga., 582, it is said: "We do not think the profitableness of this contract to the stockholders of the corporation has anything to do with the matter. These stockholders have a right of their pleasure to stand on their contract. If the charters do not give these companies the right to go into this new enterprise, any one stockholder has the right to object. He is not to be forced into an enterprise not included in the charter. That it will be to his interest is no excuse; that is for him to judge."

"The right of a nonassenting stockholder to equitable relief does not depend in any respect upon the profitableness or unprofitableness of the transaction. He has the legal right that the corporation shall keep within the powers granted by the charter." *Byrne v. Elec. Mfg. Co.*, 65 Conn., 336, a very able opinion by *Andrews, C. J.*, reviewing the authorities.

It is true, as held by numerous courts, including our own, that the doctrine of *ultra vires* has been very much modified in recent years, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were formerly declared absolutely void. *Hutchins v. Bank*, 128 N. C., 72; Womack Pr. Corp., 142. This modification of the doctrine does not involve the right of a dissenting stockholder or, in an appropriate case, the State to enjoin a threatened *ultra vires* act.

The plaintiff does not call into question the *bona fides* or the good judgment of the other stockholders. His principal apprehension appears to be that the corporation has no insurable interest in the life of Mr. Wilson, and that the assignment will be held void or the policy itself so held. We are of the opinion that, conceding for the sake of argument that a corporation has an insurable interest in the life of one of its officers, within the ruling of a number of the courts, and conceding, further, that such interest continues after the relation is severed, as in this case, these concessions by no means settle the question of the power of the corporation to take the assignment and pay out of the corporate funds the premiums on such policies. What the court may decide at the death of Mr. Wilson in respect to the right of the corporation to enforce payment, or, if paid by the insurance company, the right to hold as against his personal representatives more of the proceeds than the premiums paid and interest, is uncertain. It is true that the company and Mr. Wilson are parties to this action, but it is by no means certain that these questions are "within the issues" arising upon these pleadings. The charter is not made a part of the pleadings, and there is no suggestion that it contains any express power to enter into this contract or expend the assets of the corporation in payment of the premiums. In ascertaining the extent of corporate powers the court will not, without an inspection of the charter, presume that unusual and extraordinary powers are conferred. It is elementary that the charter is the only source to which the court can look to ascertain what power is conferred. "A corporation, being the mere creation of the law, possesses only those properties which the charter of its creation either expressly or as incidental to its creation confers." *Marshall, C. J.*, in *Dartmouth College case*, 4 Wheaton, 518. "An incidental power exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it—that is to say, the powers necessary to accomplish the purposes of

its existence—and can in no case avail to enlarge the express powers and thereby warrant it to devote its efforts or capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely, connected with its specific corporate purposes." 10 Cyc., 1096. The complaint alleges that the defendant is a corporation, duly created, organized and existing pursuant to the laws of this State, engaged in the operation of a cotton mill in the city of Charlotte. It is therefore a manufacturing corporation, with the powers usually conferred upon and reasonably necessary to the accomplishment of the purposes of its creation, such as to erect necessary houses for the installment of machinery, warehouses for storing its property, dwellings for its officers and operatives, to buy raw or partially manufactured cotton in such condition and quantities as the demands of its business require, to employ labor, buy fuel and other things necessary or useful for its business, to sell the output of its mill, to borrow money and execute its notes, and do all such other things as are reasonably incident to the accomplishment of its corporate operations. It may, of course, insure its property against loss or damage by fire or other accidents to which it is subject. It is not easy to enumerate the implied powers which attach to a corporation of this kind, and it would throw no light on the question involved in this appeal to attempt to do so. The learning and industry of counsel—and we have none at this bar who excel them—have failed to direct our attention to any case "in point." It is difficult to see where the power is to be found by implication. If the power to insure the lives of its presidents or to have them insure their lives, and immediately, as a part and in furtherance of the arrangement with the presidents, transfer the policy, the corporation paying each premium, is to be found in the charter as incident to the express powers, we should find it difficult to fix any limit in respect to other officers or employees or the amount of the insurance carried. If the

power is found by implication in the charter of a cotton mill, why would it not be equally so in any and every business, manufacturing or moneyed corporation? If the power is given, its exercise cannot be controlled by the Court. It is said, and the authorities are to the effect, that life insurance is not a contract of indemnity, but a promise, upon certain conditions being performed, to pay an amount either certain or capable of being made so. The New York and some other courts hold that an insurance policy payable to the personal representatives of the insured is a chose in action, assignable as a promissory note or bill of exchange, without any regard to an insurable interest in the assignee. Taking this view of it, in what respect, so far as the power is concerned, does this case differ from the annual purchase by the corporation of a note or bond from Mr. Wilson with the assets of the company? The power to insure the property against "loss or damage" by fire or tornadoes or other dangers usually the subject of insurance is based upon the power and duty of the directors to resort to the usual methods to protect and indemnify the company against such accidents. It is in accordance with the universal custom of prudent business management. We do not think that the insurance of the lives, certainly extending beyond the term of office or employment of its officers or employees, comes within the principle of implied or incidental powers. While it is not necessary to indulge in suggestions of undesirable or injurious results more or less likely to flow from the course pursued by the defendant, it requires no very acute prevision to see how easily the power may be unwisely exercised. It affords a temptation to depart from sound, safe methods of operating the affairs of the corporation and launch into speculation based upon anticipated large returns, hastened by the age, condition of health, etc., of the officers. Again, it is a temptation to acquire interest in and ultimate control of the insurance company and the investment of its surplus, all of which have been demonstrated to be unsafe and unsound

corporate business methods. The stockholders, instead of receiving fair, reasonable dividends on their investments, find the earnings expended in carrying insurance policies on the lives of men long since retired from any connection with the corporation. The argument that the lives of officers who have special peculiar capacity or business relation are valuable to the corporation is persuasive in support of the power to insure their lives during their term of office, but loses its force when urged as the basis for finding the incidental power when the relation has ceased to exist.

We appreciate the elusive elasticity of the term "public policy" and the difficulty of restricting its application to particular cases. But we cannot fail to see the dangerous results following a loose construction of corporate powers. Corporations are essential and useful agencies for the promotion of industries, the development of the resources of the country, the carrying on of the great enterprises of modern life. Their usefulness is largely dependent upon a close adherence to the purposes of their creation and operating within their fixed, chartered channels. It is impossible to fail to recognize the truth that in their management there is an absence of that sense of personal responsibility which is the safeguard to private business enterprises. Conceding in the largest degree absolute good faith and equally good judgment on the part of the managing officers of this corporation, we must decide the question presented upon general principles which time and experience have established as sound policy. If every business, manufacturing or moneyed corporation in this State, with equally good faith and equally good judgment, were to adopt the policy pursued in this case, it would not require any considerable sagacity or foresight to see the consequence liable to follow. There are few investments of more uncertain value than a life insurance policy, as there is nothing more uncertain, as we are taught both in the Scriptures and by experience, than the period of a given human life. The

safety of insurance companies consists in the average length of life among thousands of persons. This would be of but little avail to the corporations. The desire to eliminate the possibility of loss by the death of the president during his term is to be commended, but the necessity for paying out large sums after his life has ceased to have any possible relation to the welfare of the company, with all of the uncertainty attendant upon the cost and ultimate result, requires an investment out of all proportion to the purpose in view in making the original contract. Without passing upon the question of insurable interest, which is not very clearly involved as the matters now stand, we conclude that the complaint and answer do not disclose any power, either express or implied, enabling the cotton mills to enter into or continue to pay out the assets of the company upon the contract. It is not one of the incidental powers vesting in a manufacturing corporation.

We have given the other question which was strongly urged upon our attention a careful examination. The authorities in other States are not uniform in regard to relationships which give to one person an insurable interest in the life of another. In a well-considered opinion by *Fish, C. J.,* in *Rylander v. Allen,* 125 Ga., 206, the decisions in the different States are classified and reviewed. He places North Carolina with those States holding that an insurable interest is essential to the validity of an assignment of a life policy, and says that the majority of the courts hold otherwise, citing cases sustaining the statement. While we have examined a number of the authorities cited in the exhaustive briefs filed by counsel, we think it wise to adhere to what has been held by this Court in *Trinity College v. Insurance Co.,* 113 N. C., 244; *Hinton v. Insurance Co.,* 135 N. C., 314. We do not find any case in which the exact question presented upon this appeal is decided. In *Warnock v. Davis,* 104 U. S., 775, the policy was taken upon the life of the insured, payable to himself and assigned to the Scioto Trust Association, pursu-

ant to an agreement that the trust company would pay all of the premiums and receive nine-tenths of the proceeds upon the death of the insured. The insurance company paid the amount to Davis, representing the company. The suit was brought by the personal representative of the insured for the recovery of the amount of the policy. The court held that, as the trust company had no insurable interest in the life of the insured, the assignment was invalid, and plaintiff received the amount, less the premiums and interest. The learned Justice writing the opinion notes and rejects the doctrine of the New York Court. We note the language of *Parker, C. J.*, in *Steinback v. Diepenbrock,* 158 N. Y., 24, referring to the *Warnock case.* He calls attention to the fact that the Court treated the transaction upon its face as a wagering contract: "In the opinion it is said that the assignment of a policy to one not having an insurable interest is as objectionable as the taking out of a policy in his name. The remark was clearly true, as applied to the facts in that case, for the policy was taken out in pursuance of an agreement to assign it. It was, therefore, in fact a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured and by him assigned to said parties. In such case the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law." He further says that the real difference between the courts holding the two views is not one so much of principle as it is whether the question is one of law or of fact. "In this case the policy was five years old, the cash surrender value was $485, and, being pressed for money, the insured sold it for $600. It will be found upon examining the facts in the cases that there is much contrariety of opinion, after passing well-defined relationships, in respect to what is an insurable interest. In many cases the question has arisen after the death of the insured in controversies between his personal representatives and the assignee. In other cases the company has

raised the question. The courts indicate a desire to effectuate the intention of the parties without abandoning reasonable limits upon the boundary of insurable interests."

In *Mechanics Bank v. Commissioners,* 55 Atl. Rep. (New Hampshire), 191, the secretary and treasurer assigned a policy on his life to the bank, but he was an endorser on a large note, the maker of which was insolvent, and the policy was taken out some time before it was assigned to the bank. *Remick, J.,* writes an exhaustive opinion sustaining the right of the bank to retain the amount of the policy. It is not practicable to review the numerous decided cases cited in the briefs. The facts in many of them control the decision. They may be found collected and classified in 1 Cooley Ins. Briefs, 244. The question is a delicate one, and we should hesitate to say more than is necessary to the decision of this appeal.

It appears to us that to some extent anything said is but *dicta,* as there are no facts, no conditions rendering it either necessary or proper to say more than that, in any point of view, the corporation has no right or power, if a stockholder objects, to use its funds for the purpose of paying these premiums. As the case is before us upon demurrer, we do not decide more than that the plaintiff was entitled to enjoin the further payment of premiums on the policy. The adjustment of the rights of the parties as they stood when the action was brought will, unless they can agree, be presented by some appropriate pleadings and orders. The judgment of the court below is

Reversed.

H. M. VICTOR v. CHADWICK MANUFACTURING COMPANY, E. A. SMITH AND TRAVELERS INSURANCE COMPANY.*

(Filed 29 May, 1908.)

For digest, see *Victor v. Louise Mills*, next above.

ACTION heard upon pleadings by *Moore, J.*, at March Term, 1908, of MECKLENBURG.

This action is brought for the same purpose as and in many respects is similar to the case of *Victor v. Louise Cotton Mills*, the only substantial difference being that the defendant E. A. Smith was at the date of the issuance of the policy and its assignment and is now the president of the defendant manufacturing company. The defendant insurance company holds the policy assigned to the defendant manufacturing company as collateral security for a loan made to said company. The appeal is presented in the same manner upon the pleadings as the other. His Honor overruled the demurrer, and plaintiff appealed.

No counsel for plaintiff.

Winston & Bryant and *Tillett & Guthrie* for defendants.

CONNOR, J. The only difference between this case and the other one, between the present plaintiff and the Louise Mills, is that the insured assignor is at this time the president of the corporation. In the view which we take of the case as set out in the opinion in that case, this fact does not affect the result. The preliminary questions in both cases are the same. For the reasons given in that opinion, we are of the opinion that the payment of the premiums on the policies is *ultra vires*. We note in the pleading the allegation, admitted to be true, that the defendant company has contracted a loan upon the policy with the defendant insurance company. The rights of the companies will be adjusted as suggested in the other case. The judgment overruling the demurrer to the answer is

Reversed.

*BROWN, J., did not sit.

COMMISSIONERS OF HENDERSONVILLE v. C. A. WEBB & CO.

(Filed 29 May, 1908.)

1. Cities and Towns—Debt—Necessaries—Bond Issue.

The governing authorities of a town may, in the exercise of good business prudence and under existing conditions rendering such course desirable and proper, issue bonds for the present or ultimate payment of a debt lawfully incurred for the necessary expenses of the town.

2. Cities and Towns—Pavements—Debt—Necessaries—Vote of People—Constitutional Law.

The cost of maintaining the streets of a town, to the extent and in the manner required for the well ordering and good government thereof, is a necessary expense, and an indebtedness incurred therefor without submitting it to a vote of the people is not unconstitutional on that account, under Constitution, Art. VII, sec. 7.

3. Same—Statutory Requirements.

When the governing authorities of a town are given legislative power to issue bonds for the payment of the necessary expenses thereof, but by the same power it is provided that the question shall be submitted to the voters thereof for their approval, the provision of the statute in this respect must be complied with to give validity to the issue.

4. Same—"Streets" Include "Sidewalks," When.

The charter of a town provided that when the commissioners decided to pave the streets thereof the question should be submitted to the vote of the people. In a suit to test the validity of a bond issue of $18,000 to pave the sidewalks, etc.: *It was held*, that in an undertaking of this magnitude by a town the term "streets" included the sidewalks, and if such purposes were necessary to the town the statutory provision that the question should be submitted to the vote of the people must be complied with.

5. Same—Lien on Adjoining Land.

A provision in the charter of a town that the lot owners may be required to pave the sidewalks, under certain circumstances, and to pay therefor, and if they fail to do this, after proper notice, the town commissioners may have them paved and charge the amount as a lien on the property to the respective owners, does not authorize a bond issue by the town, without a vote of the people, which embraces a general scheme for paving the sidewalks or an indefinite, undesignated number of them, and for incurring a town indebtedness of $18,000 for this general purpose, when by another provision of the charter it is required that the question of paving the streets shall first be submitted to a vote of the people.

ACTION heard on case agreed and by consent of parties, before *Ward, J.*, on 11 May, 1908, from BUNCOMBE.

The facts are stated as follows:

1. That heretofore the plaintiffs, by a resolution duly and legally adopted, decided that it was necessary and for the good of the town of Hendersonville that certain sidewalks of said town be rebuilt and repaired and laid in cement, and that, in order to secure the money to defray the cost of the same, said town, under and by virtue of its charter and the amendments thereof, and of section 2930 of the Revisal of 1905, and especially under sections 1 and 6 of chapter 97 of the Private Laws of 1901, decided to issue its coupon bonds to the amount of $18,000, dated 1 April, 1908, drawing interest at six per cent., and payable $2,000 1 April, 1918, and $2,000 each year thereafter until all are paid. That by virtue of section 6, Private Laws 1901, ch. 97, the town commissioners have passed an ordinance requiring the property owners abutting on said sidewalks to make cement sidewalks according to a plan set out in said ordinance, and have notified all the property owners to begin performance of said work as required by said section and ordinance, and that the said owners have failed to do so according to law, and that the said commissioners, under the law, in the exercise of their discretion, decided to do said work and to thereafter collect out of said property owners the costs thereof according to law.

2. That the defendants duly entered into a contract with said town for the purchase of said bonds, said contract of purchase to be carried out only upon condition that defendants' attorneys approved the legality of said bonds; that said attorneys, after an examination into the legality of said bonds, advised defendants that, in their opinion, the said town had no right to issue bonds for the purpose of laying sidewalks, but that, if it has such right, yet, under sections 1 and 6 of chapter 97 of the Private Laws of 1901, the said town could not issue said bonds unless the said town was authorized to

do so by a majority of the qualified voters thereof at an election duly and legally called for that purpose, and that no election has been held for this purpose.

3. That the defendants, in good faith, in pursuance of the advice so given them by their attorneys, have declined to complete said contract and to take up said bonds, claiming that said town has no right to issue said bonds.

Upon the foregoing statement of facts the court is requested to decide (1) whether said town has the right and authority to issue said bonds, and (2) whether it has the right to issue said bonds in the absence of an election.

If the court shall hold that the city has the right to issue said bonds, then the defendants agree to carry out said contract; otherwise, they shall not do so.

And it was further agreed that no election had been held on the proposition to issue the bonds in question. Upon these facts the court below, being of opinion that the bonds would constitute a valid indebtedness of the town without any election of the voters thereof, adjudged that, on the bonds being duly tendered by plaintiffs, the defendants should accept and pay for same, and defendants excepted and appealed.

E. W. Ewbank and *Busbee & Busbee* for plaintiffs.
Charles A. Webb and *Murray Allen* for defendants.

HOKE, J., after stating the facts: The decisions of this State sanction the position that the cost of maintaining the streets to the extent and in the manner required for the well ordering and good government of a town is a necessary expense, and that an indebtedness incurred for such a purpose does not come under the prohibition of section 7, Article VII of the Constitution, which forbids a municipality to contract a debt, pledge its faith or loan its credit, etc., except for the necessary expenses thereof, without a vote of the people. *Fawcett v. Mt. Airy*, 134 N. C., 125. And when the power to incur a debt for a necessary expense exists, there would

seem to be no good reason of law to prevent the governing authorities of a town from making provision for the present or ultimate payment of such a debt by issuing bonds for the purpose, if good business prudence and existing conditions are such as to render this course desirable and proper. *Jones v. Commissioners of Madison County,* 137 N. C., pp. 579-599; *Johnston v. Commissioners,* 67 N. C., 103.

As said by *Pearson, J.,* delivering the opinion in the case last cited, "When the defendants, 'the board of commissioners,' succeeded to the office and duties of the justices of the peace in this regard, and found a very large amount of interest in arrears, was it the duty of the board of commissioners to levy and collect a tax in one year sufficient to pay off the accumulated interest for some fifteen years? Or did they have a discretion to endeavor to break the force of this burden upon the taxpayers of the county by issuing county bonds to raise a part of the amount called for and levying a tax for the residue? We think the board of commissioners had this discretion, and it seems to have been exercised in a discreet manner."

While there is no constitutional inhibition, however, on the issuance of these bonds, the authorities with us are to the effect that when the charter of a municipality, or general or special legislation applicable to the question, requires or provides that a proposition to incur an indebtedness or issue bonds for a given purpose shall be submitted to the voters of a town for their approval, this will amount to a statutory restriction, and such indebtedness shall not be incurred unless the measure has been sanctioned and approved by the voters, according to the provisions of the statute; and this though such indebtedness is properly classed as a necessary expense. *Robinson v. Goldsboro,* 135 N. C., 382; *Wadsworth v. Concord,* 133 N. C., 587.

In the case before us the proposition is to issue bonds of the town of Hendersonville, to the amount of $18,000, to

raise money for the purpose of "building and repairing certain sidewalks in the town and laying the same in cement." The charter of the town (chapter 97, Laws 1901, sec. 9) provides that, when the commissioners shall decide to pave "the streets of said town or any of the streets of said town, the question shall be submitted to and decided by a majority of those voting upon the proposition, the vote to be taken in the same way that elections are held for other municipal purposes," etc. The term "streets" may and frequently does include both sidewalks and driveways, and, while there are many decisions which, under certain facts and conditions, distinguish and separate the two, we are clearly of opinion that in an undertaking of this magnitude, involving an expenditure of $18,000 in paving sidewalks, both the purpose of the law and its correct interpretation require that the term "streets" in this connection should include sidewalks, bringing the proposition within the provisions of section 9 of the charter, requiring that a vote of the people should be taken.

It is true that the commissioners in this instance profess to be acting under and by virtue of section 6 of the charter, and claim that by reason of this section the bonds for the purpose proposed may be issued without a vote. This section provides that the lot owners may be required to pave the sidewalks, under certain circumstances, and pay for same; and, further, that if they fail to do this, after proper notice, the commissioners of the town may have them paved and charge the amount to the respective owners, and such charge is made a lien on the property. It may be that, if the town commissioners could pave the sidewalks of certain individual owners, who had been duly notified, from the current revenue, amounting only to an item of charge in the current expenses of the town, such a plan could be carried out under provisions of section 6. But the proposition contained in these facts is not so restricted. As heretofore stated, it embraces a general scheme for paving the sidewalks of the town, or an indefinite,

undesignated number of them, and for incurring a town indebtedness of $18,000 for this general purpose. In our opinion this proposition is entirely beyond the scope or purpose of section 6, and comes clearly within the requirements of section 9, and, before it can be lawfully carried out, must have the approval of the voters, taken in the manner required by the statute.

There was error in holding that the proposed bonds should be a valid indebtedness of the town, and the judgment below to that effect must be reversed.

This will be certified, that the judgment may be entered according to this opinion in the Superior Court of Buncombe County.

Reversed.

COMMISSIONERS OF PITT COUNTY v. MACDONALD, McKOY & CO. AND W. S. GLENN.

(Filed 29 May, 1908.)

1. **Counties—Bond Issues, Validity of—Taxation—Levy—Constitutional Limitations.**

County bonds issued by a popular vote of the county for training-school purposes, under legislative authority, without provision to exceed the constitutional limitation of levy for principal, interest or for a sinking fund, are valid and a good tender, under a contract with the purchasers calling for the delivery of valid bonds, though they are not for necessary purposes.

2. **Same.**

When bonds are issued by a county by popular vote, under legislative authority, which does not further provide for a levy to exceed the constitutional limitation for principal, interest or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction. State Constitution, Art. VII, sec. 7. (*Charlotte v. Shepard*, 122 N. C., 602, where the bonds were issued by a town, cited and distinguished.)

BROWN, J., concurring *arguendo*. CONNOR, J., dissenting; HOKE, J., concurring in dissenting opinion.

ACTION upon case agreed, heard by *W. R. Allen, J.*, at May Term, 1908, of PITT.

T. J. Jarvis for plaintiffs.
F. G. James for defendants.

CLARK, C. J. The bonds ($50,000) were issued by Pitt County, though not for necessary purposes, but by virtue of a popular election and under special authority of the General Assembly (Laws 1907, ch. 493). They are valid bonds of the county of Pitt, and this has been expressly held as to these identical bonds. *Cox v. Commissioners,* 146 N. C., 584.

The bonds being valid, it follows that taxes can be levied, up to the constitutional limitation, to pay the interest as it falls due and the principal at maturity. *Ralls v. United States*, 105 U. S., 733. The purchasers of the bonds, not content with the validity of the bonds, now urge that there is no power to levy taxes for the payment of interest if in excess of the constitutional limit, nor to raise a sinking fund to take up the principal thirty years hence. This is true. There can be no levy of taxes in excess of the constitutional limitation, even for necessary purposes, without special permission of the General Assembly, nor for other than necessary purposes except by a vote of the people besides. The act of the General Assembly in this case (Laws 1907, ch. 493) contains no authority to exceed the constitutional limitation for interest or principal, nor to provide a sinking fund. Consequently there has been no vote of the people on that proposition and no such authority has been given. *Board of Education v. Commissioners,* 107 N. C., 110.

It does not appear in this record that it will be necessary to levy taxes in excess of the constitutional limitation to meet the interest on these bonds. Being valid bonds, the commissioners can be compelled by *mandamus*, if necessary, to levy up to that limit to meet the interest. *Ralls v. United States, supra.* It does not appear that the defendants contracted for

bonds for which there should be authority conferred by legislative enactment and popular vote to levy taxes in excess of the constitutional limit to pay interest and to raise a sinking fund to pay the principal. Presumably they did not, as they must have had the statute before them and have seen that the authority to do these things was not given. When these bonds fall due, thirty years hence, Pitt County will doubtless have sufficient wealth and population to meet them with the greatest ease, or sufficient credit to renew them if desired.

Upon the case agreed it appears that the contract of the defendants calls for the delivery of valid bonds of Pitt County. These are valid bonds, for which taxes to pay interest can be levied up to the limit prescribed. They are, therefore, a good tender under the contract.

Charlotte v. Shepard, 122 N. C., 602, is not in point. There being no constitutional limitation upon taxation by a town, when an act of the General Assembly authorizes an issue of bonds upon a vote of the people, and such vote is favorable, there is authority to levy taxes without limitation (unless prescribed in the act) to meet principal and interest. *Young v. Henderson,* 76 N. C., 420. Not so as to county bonds not issued for necessary purposes, as to which authority to issue carries authority to levy taxes for payment of interest, but not beyond the limitation unless so provided in the act and voted by the people. *Smathers v. Commissioners,* 125 N. C., 480; *Ralls v. United States,* 105 U. S., 733. Even for the most necessary county purposes taxes cannot be levied beyond the limit except by legislative authority, and for other than necessary expenses no tax can "be levied or collected" unless authorized "by a vote of the majority of the qualified voters." Const., Art. VII, sec. 7. The bonds being valid and a good tender, under the contract as set out in the record, the judgment is

Modified and Affirmed.

BROWN, J., concurring: I concur fully in the opinion rendered in this case by the Chief Justice for the Court. I am of opinion that the bonds constitute a valid indebtedness of the county of Pitt, and that the interest and principal may be paid out of the general revenues of the county. I should deeply regret to retard the establishment of the Eastern Training School, and see no reason why our decision should retard it, but I am compelled to follow what to me appears the plain and unequivocal language of our State Constitution. Section 7, Article VII, is in these words: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, *nor shall any tax be levied or collected* by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

The language of section 6, Article V, is equally explicit, and expressly forbids the levying of county taxes for special purposes, unless by "special approval of the General Assembly." It is admitted that the debt is contracted for a special purpose, and consequently any tax specially levied to pay it must have the special approval of the General Assembly; otherwise, the plain language of the Constitution goes for naught.

There being no legislation authorizing such special tax levy, the approval of the General Assembly is wanting, and it follows that the purchaser must rely on the general revenues of the county for his payment.

It is but just to presume that the reason the usual provision for a special tax to pay interest and to provide for a sinking fund was omitted in this act was because the county authorities doubtless thought the general revenues of the county amply sufficient to meet their obligations.

So far as the purchaser is concerned, he knew when he bid for the bonds that no such special tax levy is provided for in the act, and if he was at all familiar with bond legislation in

this State for many years past he must have known that in legislation of this character the acts invariably provide, not only for contracting the debt, but for levying a special tax for interest and sinking fund purposes. It is possible there are voters who voted for this bill who would not have voted for it with a special-tax provision in it.

Again, section 7, Article VII, is as mandatory as language can make it. It not only expressly forbids the contracting of the debt, but also prohibits the levying of the tax without the approval of the qualified voters. "Nor shall any tax be levied or collected," etc., says the Constitution. There is a double prohibition—one against contracting the debt and the other against levying the tax. The cases cited from the Supreme Court of the United States have no application to this case, so far as I can see. That Court was not confronted in those cases with express constitutional restrictions, such as are contained in our organic law.

I am not responsible for the decision in *Charlotte v. Shepard,* 122 N. C., 602, but I think the distinction pointed out between that case and this is well taken, inasmuch as section 6 of Article V has no application to cities and towns.

CONNOR, J., dissenting: I concur in the conclusion that the bonds in controversy are valid, as held by us in *Cox v. Commissioners, supra.* I dissent from so much of the opinion as holds that the Commissioners of Pitt County have no power to levy a tax beyond the limit prescribed by Article V, section 6, of the Constitution. I do not think that section 6 of Article V has any bearing upon or relation to the power to levy taxes to pay the interest and provide a sinking fund for the payment of these bonds. They rest upon the direct vote of the people, pursuant to Article VII, section 7, of the Constitution. This section confers upon or, speaking more accurately, reserves to the counties, cities and towns the power to contract debts and levy taxes to pay them, with the ap-

proval of the majority of the qualified voters therein. The language is restrictive upon the Legislature and the governing body of the municipality, but gives to the people the power to contract the debt and, by necessary implication, to provide for its payment. If the debt be for necessary expenses, the municipality acts promptly through its governing agents; but if, as in this case, the people wish to promote their welfare for an extraordinary purpose, they must confer the authority to contract the debt upon the commissioners, not by a mere plurality, but by a majority of the qualified voters. Thus read, we have a clear conception of the true purpose and meaning of the provision. It is entirely independent of legislative approval. Its manifest purpose was to permit the people, by a majority of the qualified voters, to contract debts for such purposes as they might deem conducive to their corporate welfare. It will be noted that the words "except for necessary expenses" exclude the idea that section 6 of Article V has any bearing upon the power conferred by this section (7). Section 6, Article V, has no relation whatever to contracting debts or levying taxes to pay the interest or principal on debts contracted by a vote of the people. The only effect of the legislative act is to prescribe the machinery for submitting the proposition, with the terms, etc. Bonds issued pursuant to section 7, Article VII, do not derive their validity from any action of the Legislature, but from the vote of the people. The Legislature cannot, under section 6, Article V, authorize the contraction of a debt, but, in the express language thereof, may authorize the commissioners to levy a special tax for a special purpose, having no relation whatever to the contraction of debts or providing for their payment. This Court has uniformly held that, for "the necessary expenses," a county, city or town may, without the approval of the Legislature or a vote of the people, contract a debt. This power, of course, carries with it as a necessary incident the power to levy a tax to pay the interest and provide for the

payment of the principal. *Fawcett v. Mt. Airy,* 134 N. C., 125. We have held in a number of cases that counties and towns may, without submitting the question to a vote of the people, issue bonds for necessary expenses. If the purpose is not "a necessary expense," the debt can be contracted only with the approval of a majority of the qualified voters. When given, it carries as incidental the power to levy a tax to provide for its payment. The expression "nor shall any tax be levied," etc., was made a part of section 7, because without it the remaining portion of that section would have permitted a not improbable construction that, while municipalities could not contract a debt, they could undertake some enterprise, not a necessary expense, by levying a present tax sufficient to pay the same. But when the power to contract a debt has been submitted to and approved by a popular vote, the uniform current of authority is to the effect, as stated, that when the power to contract a debt is properly conferred, the power to pay the debt in the ordinary way is necessarily implied. This is the construction put upon the Constitution in *Charlotte v. Shepard,* 122 N. C., 602. It is interesting to note the language of the Court in that case, as reported in 120 N. C., 411. The identical line of reasoning now adopted was used by the Justice writing at that time. Referring to the election held in Charlotte, in which the people approved the issue, he says: "It was only an election concerning the *issue of the bonds,* and not concerning the consent of the voters that the board of aldermen might levy a tax to pay the bonds. That question was not submitted to a vote nor was it voted upon." There was no express power conferred upon the city authorities to levy a tax to pay the interest or provide for the principal when due. It was stated in the case agreed that the charter fixed the rate of taxation which could be levied by the city, and that "the taxes authorized to be levied would not pay the ordinary and current expenses of the city and also the interest and principal on said bonded indebtedness." The case of

Ralls v. United States, 105 U. S., 733, was cited in the opinion, and it was said: "In *that* case there was no special limitation. In the case before us there is such special limitation." Thus we see that the Court reached the conclusion in that case upon the ground that a vote to *issue the bonds* did not carry with it the power to levy a tax beyond the limits fixed by the charter. In the same case, upon a petition to rehear, the decision was reversed. The opinion cites with approval the *Ralls case, supra. Furches, J.,* says: "When such a corporation has thus acquired the right to create the debt and issue the bonds, this power carries with it the power to levy the taxes necessary to pay said bonds and the accruing interest thereon. *Ralls case,* 105 U. S., 733; *United States v. New Orleans,* 98 U. S., 381. It is admitted that these cases are direct authority for this position, if there is no public law to the contrary, but it is suggested that Article VII, section 7, of the Constitution provides otherwise, and therefore the doctrine declared in these cases does not apply and that it is necessary that the power to tax should be *expressly* granted in the legislative act. We do not think Article VII, section 7, *nor any other provision in the Constitution,* contains any such requirement as this. * * * We cannot believe that it was ever intended by this section of the Constitution to authorize the creation of a debt without authorizing the power to pay the same. And a municipal corporation has no means of payment but by taxation." These are wise words, expressing wholesome truth. The people of this Commonwealth or any political division thereof never voted to issue and sell a bond, use the proceeds for the purposes for which it was issued, with no intention of providing for its payment. *Faircloth, C. J.,* concurred, saying: "The question there is presented whether the board, having acquired authority by complying with the provisions of the act to contract the debt and issue bonds for paying the same, and having made such contracts, has an implied authority to levy

taxes to meet this obligation. I think they have. This is the only question." This decision, expressly reversing and rejecting the reasoning in the first decision, is by a unanimous Court, the Justice writing the first opinion concurring. I confess my inability to see any distinction between the cases. Article VII, section 7, applies to "counties, cities, towns and other municipal corporations," making no distinction between them. It will be observed that in *Shepard's case* the charter of the city of Charlotte limited the rate of taxation. The decision is not put upon the suggestion that the act authorizing the issue of the bonds with the approval of the people amended the charter, but upon the ground that by necessary implication the power to levy the tax was conferred. If it be conceded that section 6, Article V, applies, and that double the State tax cannot be exceeded without the special approval of the Legislature, why does not the power to levy the necessary tax to pay the interest and provide for the principal pass as incident to the power to contract the debt, thus finding by necessary implication the approval of the Legislature? The principle upon which *Shepard's case* was rested (122 N. C., 606) is uniformly announced in every other case. Beginning with *Loan Association v. Topeka,* 20 Wall., 660, it is said "that when the Legislature confers power upon a county or city to contract a debt, it intends to authorize to levy such taxes as are necessary to pay the debt, unless there is in the act itself or in some general statute a limitation upon the power of taxation which repels such an inference." This case is followed by *Ralls' case, supra,* citing cases from several States. In *Parsons v. Charleston* (Hughes, 282), *Waite, C. J.,* said: "When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it." In *Ralls County Court v. United States,* 105 U. S., 733, *Waite, C. J.,*

says: "The power to tax is necessarily an ingredient of such power to contract, as ordinarily political bodies can only meet their pecuniary obligations through the instrumentality of taxation. This general doctrine has been so many times announced that it cannot be necessary now to do more than refer to it," naming a number of cases. In *Quincey v. Jackson*, 113 U. S., 332, *Harlan, J.*, says: "In giving authority to incur obligations for such extraordinary indebtedness the Legislature did not restrict its corporate authorities to the limit of taxation provided for ordinary debts and expenses." In *Scotland County Court v. Hill*, 140 U. S., 41 (47), *Harlan, J.*, says: "The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much expressed as the other." *State v. Mayer, etc.*, 109 Tenn., 315. Without further pursuing the decided cases in which the principle is uniformly enforced, I must confess, with all possible deference to my learned brethren, that I regard the conclusion to which they have arrived as a serious blow to the credit of the municipal corporations, including counties, of the State. I fear that, relying upon the decision in *Charlotte v. Shepard, supra*, many bonds have been issued under acts similar to the one before us. Their value must be seriously impaired by the decision now made, which, I think, practically overrules *Shepard's case*. It is not surprising that at each term of the Court we are called upon to pass upon the validity of municipal bonds. The credit of the State and its municipalities was never so high as at this time. The uncertainty of the validity of our bonds is the only obstruction to their sale at even higher figures, thus lowering the rate of interest. Next to character and capacity, the most valuable asset which a people, both individually and corporately, can have is the integrity of their obligations. The two first elements of credit our people possess; it is the duty of the Legislature and the courts to guarantee the last. It would be useless and frequently impracti-

cable to provide in the act authorizing the vote of the people a specific rate of taxation. It is wisely left to the local legislature, the commissioners, to levy a reasonable rate, in the light of the value of the property in the town or county. It is conceded that this is true when a town or city is authorized to contract a debt, but it is insisted that the same power cannot safely be given the county commissioners. To my mind, if any distinction is made which the Constitution does not make, the county legislative body is the safer one to entrust with the power. It was the evident purpose of our people, in their Constitution of 1868, as amended in 1875, to develop capacity for local self-government, conferring upon counties and townships municipal powers, duties and responsibilities. We have recognized the right of the Legislature to divide counties into school districts, fence districts, road districts, etc., and to confer upon them municipal powers and duties. It develops the capacity for government, encourages citizens to take a direct, personal interest in the local government, educates them, cultivates a sense of personal responsibility, etc. They contract debts, after careful consideration, for the promotion of education, good roads, public buildings, etc. I cannot but regret to see any unnecessary restrictions thrown around them. The report of the Tax Commission shows that the county of Pitt levies for current expenses 23⅔ cents on the $100 valuation for current expenses. The people have made most remarkable and gratifying progress in public schools and all other things, showing progress and prosperity. They have with remarkable unanimity, both in town and county, provided for the erection of buildings within which an Eastern Training School is to be conducted by the State. I know, of course, that the majority of the Court regret that their judgment in respect to the law seriously impedes this great work and retards it for possibly another year. I cannot but think that these people fully understood when they voted these bonds that they were conferring upon the commis-

sioners the power to levy a small tax to pay the interest and provide a sinking fund for their redemption. I cannot concur in the judgment, which compels the defendants to accept bonds which doubtless they contracted to purchase and the plaintiffs contracted to sell, relying upon the decisions of this Court that the commissioners had the power to provide for their payment. To compel them to accept discredited bonds, utterly worthless, would savor of bad faith. In the light of the decision I think that the judgment of his Honor should be reversed. I am quite sure that the citizens of Pitt County would not compel the acceptance of a bond which they had no power to pay. The State of North Carolina cannot afford to educate her children upon the money of strangers without affording them an assurance that it will be repaid, with interest.

ANNIE H. CAMPBELL v. ELIZA W. CRONLY ET AL.*

(Filed 29 May, 1908.)

ACTION heard by *Neal, J.*, at December Term, 1908, of NEW HANOVER.

Both parties appealed.

Empie & Empie for plaintiff.
Meares & Ruark for defendants.

PER CURIAM: This cause is remanded to the Superior Court of New Hanover County, to the end that Alex. T. London, the alleged purchaser of the land, be made a party.

The judgment of the Superior Court is set aside.

*WALKER, J., did not sit upon the hearing of this case.

J. L. COTTRELL v. TOWN OF LENOIR.

(Filed 29 May, 1908.)

1. **Municipal Bonds—Registration Books—Charter and Further Legislative Provisions—Interpretation—Constitutional Law.**

When there is a charter requirement of a municipality that registration books be kept open for twenty days preceding an election, and, under the provisions of a subsequent legislative act, bonds are issued pursuant to a further requirement that ten days' previous notice shall be given of the whereabouts of the registrar, the provision of the act is construed to supply a reasonable requirement, concerning which the charter is deficient, and the issue is valid when the provisions of the charter and the act are complied with.

2. **Municipal Bonds—Legislative Authority—Vote of People—Constitutional Law.**

Municipal bonds for special purposes, issued by express authority of the Legislature and approved by a majority of the qualified voters of the town, are valid. (*Wharton v. Greensboro*, 146 N. C., 356, cited and distinguished.)

ACTION to restrain the issuing of certain bonds, heard at chambers by *Councill, J.*, at Statesville, 18 May, 1908, from CALDWELL.

From a judgment for defendant plaintiff appealed.

The facts are stated in the opinion.

Mark Squires for plaintiff.

W. C. Newland for defendant.

BROWN, J. By act of the General Assembly of 1907 (Private Laws, ch. 83) the town of Lenoir was empowered to issue bonds, not exceeding $100,000, for municipal improvements. Twenty thousand dollars in amount have been issued, sold and the proceeds paid into the town treasury and applied to street paving. The authorities of the town have undertaken to issue $80,000 more, to be applied to the establishment of a water and sewerage system.

It is contended by plaintiff that the entire issue is invalid:

1. Because the registration books were kept open for twenty days preceding the election upon the bond issue instead of ten days.

2. Because the entire issue is in excess of ten per cent. of the tax value of the property, in violation of section 2977 of the Revisal.

As to the first contention, we are of opinion that the bond election was properly held, in accordance with the provisions of the defendant's charter, which requires that the registration books shall be kept open for twenty days preceding the election. The evident purpose of the act of 1907 is to require that the bond election shall be held in accordance with the town charter, with the additional requirement that ten days' notice shall be given as to the whereabouts of the registrar for that time preceding the election. It seems that in this reasonable requirement the original charter is deficient.

As to the second contention, we are of opinion that the case of *Wharton v. Greensboro*, 146 N. C., 356, has no application. In that case the aldermen had general power to issue bonds, under section 100 of the charter of the city of Greensboro, when the provisions of the act were complied with. No amount was named in the act and no limit fixed. We held that in such case section 2977 of the Revisal was not repealed by implication, and that the General Assembly was supposed to have it in view when the amended charter was enacted.

In the case we are now considering there is express legislative authority to issue $100,000 in bonds, which has also been ratified and approved by a majority of the qualified voters of the town.

We are of the opinion that the issue of bonds is legal in all respects. The judgment of the Superior Court is

Affirmed.

F. H. CHAMBERLAIN, TRUSTEE, v. W. F. TROGDEN.

(Filed 29 May, 1908.)

1. Corporations — Subscription Note — False Representations — Defenses—Laches.

While one who has subscribed to the stock of a corporation and given his note therefor may, as a valid defense to an action by the trustee in bankruptcy subsequently appointed, set up that the note was given by reason of false and fraudulent representations on the part of the president as to solvency, when the company at the time in question was insolvent, he must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation.

2. Same—Questions for Jury.

In a suit by a trustee in bankruptcy on a note given for the purchase price of shares of stock in a corporation insolvent at the time, when the defense is that the subscription was induced by fraudulent misrepresentations of the corporation's president that the company was solvent, evidence upon the question of laches of the subscriber should be submitted to the jury, which tends to show that the subscriber was fifty-three years old, a man of affairs, lived in the vicinity, knew when he made the subscription that the corporation had given indications of weakness and had for a time been in the hands of a receiver; that a cursory examination of the books, accessible to him, would have disclosed that, of $25,000 of stock issued, only $4,300 had been paid in; that a large amount of the corporation indebtedness was evidenced by mortgages duly registered, and that he had been told that the company was totally insolvent and likely to go into bankruptcy.

ACTION to recover the amount of a note for $500, with interest thereon, given by defendant to the Damask Manufacturing Company for stock issued by the company and delivered to and held by defendant, tried before *Ward, J.*, and a jury, at October Term, 1907, of WILKES.

The subscription was made and note was given by defendant on 5 June, 1905. On 15 September of the same year, the company having been duly adjudged a bankrupt, plaintiff was appointed trustee; and in July, 1906, the present action was instituted to recover the amount of the note. Defendant

answered, and alleged in bar of recovery that the note was given by reason of false and fraudulent representations on the part of the president of the company.

Issues arising on the pleadings were framed and submitted, and responded to by the jury, as follows:

1. "Did defendant execute the note sued on in this case?" Answer: "Yes."

2. "Has any of said note been paid?" Answer: "No."

3. "Was the execution of said note procured by the false and fraudulent representations of Ira R. Hayes, president of the Damask Manufacturing Company?" Answer: "Yes."

4. "If so, did defendant afterwards exercise due care and diligence in discovering the fraud and repudiating the contract?" Answer: "No."

By consent of parties, the first issue was answered "Yes" and the second "No."

The defendant in apt time requested the court to charge the jury that, upon the "whole evidence, they should answer the fourth issue 'Yes.'" This was refused, and defendant excepted. There was judgment on the verdict for plaintiff for the amount of the note and interest, and defendant excepted and appealed.

R. C. Strudwick for plaintiff.

W. W. Barber and *F. D. Hackett* for defendant.

HOKE, J., after stating the facts: There is some conflict of authority as to the right of a subscriber to rescind his subscription or maintain a defense to his obligation therefor on the ground of fraud, after the corporation has become insolvent and its affairs have passed into the possession and control of a receiver or the bankruptcy court, or other method of general adjustment, primarily for the benefit of creditors. The English cases and some courts in this country have held that, under conditions indicated, it is no longer open to the subscriber to maintain such a defense. These English decisions,

however, are said to be based to some extent on the construction given to certain legislation on the subject, and the weight of authority in this country seems to establish that, under exceptional circumstances, the subscriber may avail himself of the position suggested even after insolvency. Cook on Corporations, secs. 163, 164, 165; Clark and Marshall Private Corp., secs. 473-479; *Ramsay v. Manufacturing Co.,* 116 Mo., 313; *Martin v. Land Co.,* 94 Va., 51-53; *Havard, Receiver, v. Turner,* 155 Pa. St., 349.

All of the authorities, however, are to the effect that, in order to do so, the subscriber must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation. *Thompson v. Savings Bank,* 19 Nev., 103; 3 Amer. St. Reports, note on p. 824; *Clark and another v. Thomas, Receiver,* 34 Ohio St., 46; *Wallace v. Hood,* 89 Fed. Rep., p. 11; *Wallace v. Bacon,* 86 Fed. Rep., p. 553; *Ross-Mebern-Brooke Co. v. Southern Iron Co.,* 72 Fed., 957. And this question of proper diligence is usually one for the jury. *Urner v. Sollenberger,* 89 Md., 316.

In the present action the defendant has had the full benefit of this established principle, and, under a correct charge, the jury in their answer to the fourth issue have determined the question against him. The only objection insisted on to the validity of this recovery is that the Judge below declined to charge the jury "that on the whole evidence, if believed, the jury should answer the fourth issue for the defendant," but the exception is without merit. While the time during which the defendant was under this obligation was not of any great length, it appeared that defendant was fifty-three years of age, a banker and a man of affairs, and he knew when he made the subscription that the company had given indications of weakness and had for a time been in the hands of a receiver. He was resident in the vicinity, and by slight effort and the exercise of ordinary business prudence could have easily ascertained the condition of affairs. He knew the secretary and

treasurer, and a cursory examination of the books would have disclosed that, of $25,000 worth of stock issued, only $4,300 had been paid in. A large amount of the company's indebtedness was evidenced by mortgages on the company's real estate, duly registered in the county. All this was open to him, or could have been readily ascertained, and defendant not only took no steps to inform himself and make complaint as to the alleged imposition, but there was testimony to the effect that, as late as August, when told that the company was wholly insolvent and the only chance for it was a reorganization, and that unless as much as $10,000 was raised the company would likely have to go into bankruptcy, the defendant declined to give a proxy to vote his stock, but said he intended to keep his stock and vote it himself if occasion arose.

There was assuredly no error to defendant's prejudice in submitting the question of his laches to the jury, and the verdict and judgment against him must be affirmed.

No Error.

R. H. BATTLE, EXECUTOR, v. R. H. LEWIS. (APPEAL BY VESTRY OF CHRIST CHURCH.)

(Filed 29 May, 1908.)

1. Wills—Personal Property—Legacies—Residue of a Residue.

   The general rule of construction of a will of personal property, that a general residuary clause carries whatever is not otherwise legally disposed of, has no application in construing a bequest of a residue of a residue.

2. Wills—Conversion of Real Property—Lapsed Legacy—Residue of a Residue—Intestacy—Distribution.

   When an executor is directed to sell certain real estate which belonged to his testator and pay from the proceeds a sum certain to each of specified legatees, and, in the event of the prior death of a certain one of them, his share to go to a certain church; and, further, under the same item, should there be a surplus, it should go to the said church: *Held*, by the provision of the will the proceeds of the sale of the land will be deemed personalty, and, in

the absence of a general residuary clause, a lapsed legacy of one named in this item and not therein provided for does not go to the church; for, as to this legacy, the testator died intestate, and it is subject to the general law of distribution.

3. Wills—Bequests Specific—Id Certum Est, etc.

When a will bequeathes to named legatees a fixed sum each, which is to be paid, with another fixed amount elsewhere directed to be paid in the will, from the proceeds of sale by the executor of certain land, a bequest of the residue is specific, it being capable of being made certain.

4. Wills—Construction—Evidence of Intent.

A testator devised that the proceeds of sale of certain lands were to be distributed in a certain sum each to specified legatees. In the event of the lapse of a legacy, by death, given to one of them, her brother, an old man, it was bequeathed to a certain church. Another of the legatees, her nephew, a young man, predeceased his testatrix without further provision having been made by her respecting his lapsed legacy. By the same item of the will the church was bequeathed the surplus, should there be any: *Held*, these facts were some evidence, though not conclusive, of the intention of the testator that the lapsed legacy of the nephew should not go to the church as the residuary legatee of the residue.

ACTION heard by *Biggs, J.*, at February Term, 1908, of WAKE.

This action was brought by the executor of Maria T. Haywood against her devisees, legatees and heirs at law, and the vestry and trustees of Christ Church for a construction of her will. The plaintiff alleges in his complaint:

1. That Maria T. Haywood, late of said county, died in said county during the month of December, 1906, leaving a last will and testament, of which the plaintiff was duly appointed executor, and duly qualified as such about 1 January, 1907. A copy of said last will and testament is hereto attached and asked to be taken as part of this complaint.

2. That there came into his hands as such executor the sum of $22 in cash, which has been expended, with rents from the real property of the estate from January to December, 1907, in the administration of said estate.

3. That the brother of his testatrix, Frank Haywood, and also one of her nephews, John Bryan, both named in said last will and testament, died during the lifetime of said testatrix.

4. That under the said last will and testament the plaintiff sold the property described in item 4 of said will and testament, and the assets now in the hands of the plaintiff and which will come into his hands upon the collection of the deferred payments for the purchase of said property arise entirely from the proceeds of the sale of the said property described in item 4.

5. That a doubt has arisen as to the disposition of the pecuniary legacy to said John Bryan, he having, as aforesaid, died prior to the death of said testatrix: that is, whether the same should be paid to the said vestry and trustees of Christ Church or to the heirs at law and next of kin of said testatrix. The plaintiff wishes to be advised by the court as to who is entitled to receive the said legacy of $500 given to John Bryan, deceased, as aforesaid.

6. That the defendants, other than the said vestry and trustees of Christ Church, are heirs at law and next of kin of said Maria T. Haywood, deceased.

7. That Frank Haywood, the brother of the testatrix, was at the time said will was dated an old man.

Wherefore the plaintiff asks judgment:

1. For the construction of said last will and testament as to the lapsed legacy to said John Bryan, deceased, and for a determination as to the parties thereto entitled.

2. That the costs of this proceeding be paid out of t estate of the said testatrix.

The following is a copy of the will:

"I, Maria T. Haywood, of the city of Raleigh, do make and declare the following to be my last will and testament:

"Item 1. I wish my just debts to be paid out of any moneys I may leave or have on hand or in bank at my death, and if they prove insufficient I wish my houses and lots to be

kept rented out until the rents, which shall be collected by my executor for the purpose, shall be sufficient to pay the residue.

"Item 2. I will and direct that a suitable monument shall be erected at my grave, and that my executor shall expend of the assets of my estate (about) six hundred dollars in the payment of my funeral expenses and the costs of such monument and its erection; and I give to the Raleigh Cemetery Association one hundred dollars ($100) on the condition that it will perpetually keep the lot on which my body shall be buried in good condition.

"Item 3. I give and devise to my niece, Effie Woodruff, and my nephew, Graham Haywood, my house and lot in the city of Raleigh, at the corner of Wilmington and Jones streets, and now occupied by P. H. Andrews, in *fee simple,* to be theirs in possession as soon as my executor shall have collected moneys sufficient to pay my debts in the manner provided in item one.

"Item 4. I give and devise to the executor hereinafter appointed my other two houses and lots in said city, one fronting on Wilmington Street and the other fronting on Jones Street, with their appurtenances, in trust that he will sell the same in such manner and upon such terms as to him may seem best, and apply the proceeds, first, in payment of the seven hundred dollars as designated in item 2, and then in discharge of the pecuniary legacies herein below provided for.

"Item 5. I give and bequeath to my brother, Frank Haywood, and my nephews, Frank Haywood, Jr., Sherwood Haywood, Howard Haywood, Marshall Haywood, Sherwood Badger and John Bryan, each five hundred dollars ($500); my brother, Frank Haywood, if alive at my death, to receive his legacy as soon as possible after the sale of said houses and lots, out of the cash payments. If he shall have died before my death, I give the legacy intended for him to the trustees and vestry of Christ Church, of which I am a member. Should the residue of the proceeds be insufficient to pay the

legacies to my said nephews in full, they are to abate *pro rata*; and if there shall be a surplus, I give and bequeath the same to the said trustees and vestry of Christ Church; the legacy to said church to be used and employed in such manner and for such purpose as to the rector and vestry may seem best.

"Item 6. I give and bequeath my personal effects and estate as follows: My camel's-hair shawl to my niece, Lavinia Martin; my bedroom furniture in the room generally occupied by me to my niece, Eleanor Haywood; my carved bedstead and wardrobe of the same set with it to my niece, Marian Haywood; all my silver forks to my niece, Effie Woodruff; twelve dessert silver spoons, to be selected by my executor, to my cousin, Frank Parker; and all the residue of said personal effects to my nieces, Lucy Manly, Elizabeth Young and Eleanor Haywood, to be equally divided between them.

"Item 7. I appoint Richard H. Battle, Esq., of the city of Raleigh, the executor of this my will.

"In witness whereof, I have hereunto set my hand and seal, this 14th day of June, 1895."

The devisees, legatees and heirs at law did not answer. The vestry and trustees of Christ Church admitted the allegations of the complaint to be true, and insisted that they are entitled to the lapsed legacy. The court held that the next of kin of the testatrix are entitled to the fund. Judgment having been rendered accordingly, the trustees and vestry of Christ Church appealed.

E. S. Battle for executor.
Busbee & Busbee for defendants.

WALKER, J., after stating the case: The will which we are asked to construe has no general residuary clause. The testatrix, in item 4, devised certain lots in the city of Raleigh to her executor for the purpose of being sold, with the direction that of the proceeds of the sale $700 should be applied as provided in item 2, and the residue "in discharge of the pecu-

niary legacies" given in a subsequent part of the will. In item 5 she bequeathes from the fund thus to be created by a sale of the lots the sum of $500 to her brother, Frank Haywood, and $500 to each of her nephews, who are named in that item. She then provides that, if her brother, Frank Haywood, should predecease her, the legacy intended for him shall go to the trustees and vestry of Christ Church. If the residue of the fund is not sufficient to pay the legacies given to her nephews in full, they shall abate *pro rata*, and "if there shall be a surplus" it is bequeathed to the said trustees and vestry of Christ Church. Her brother and one of her nephews, John Bryan, died in the lifetime of the testatrix. The particular question before us for our decision, and upon which our judgment and direction are now sought by the executor, concerns the proper disposition of the legacy given to the deceased nephew, John Bryan. Does it go to Christ Church, or did the testatrix die intestate as to that part of the fund, so as to subject it as undisposed of property to the statute of distribution? We are of the opinion, after most careful consideration, that the latter is the correct view to be taken in respect of this bequest. The very same question was raised in the case of *Davis v. Davis*, 62 Ohio St., 411, in which the Court, referring to a contrary ruling by the Judge below, thus states and applies the rule of construction: "This conclusion seems at variance with the will and the apparent intention of the testator. The 'balance' that is given to the so-called residuary legatees is not the general *residuum* of *all* of the testator's estate, but only what remained of a particular fund derived from specified sources, after deducting therefrom the amount of the charitable legacies and certain other charges upon it. The gift of that balance necessarily excludes from the gift everything that the will provides shall be deducted from the fund in order to arrive at the balance. The testator, when he made his will, evidently expected the bequests to the charities to be valid,

and intended the money to be applied to them as provided in the will; otherwise, he would not have made such bequests. That he did not expect those bequests to become void by his death, within a year from the execution of the will, is apparent from the fact that he made no provision for the disposition of the money in that event. And, although the bequests became ineffectual to carry the fund to the expressed objects of the testator's bounty, it seems obvious his intention was to limit the gift under the so-called residuary clause to whatever balance should remain after these and other charges were taken out of the fund from which they were directed to be paid." This fits our case exactly. We have said there is no clause in this will which purports to dispose of the general *residuum* of the testatrix's property. The item we are construing is, in terms, limited to the disposition of the balance of a particular fund which was derived from a specified source, first, to the payment of certain specified legacies, the surplus or residue, if any, to be paid to Christ Church. That surplus of a residue is only what is left after taking from the fund the amount apportioned to her brother and nephews, though from the happening of an unexpected event one of the legacies failed or lapsed. The requirement that the amount of those bequests must be taken from the fund in order to arrive at the balance that shall pass to Christ Church clearly carries an intention of the testatrix that no part of that amount shall go with it. What disposition she would have made of the legacy which would have gone to John Bryan had he survived her, if at the time she made her will she had anticipated the failure of that legacy, is left to mere conjecture, and we are not authorized to act upon the presumption that she did not intend to die intestate as to any part of her property, in order to dispose of that part of the fund as we may now suppose the testatrix would have done had her attention been directed to the matter. "In the construction of wills conjecture is not permitted to supply what the testator has

failed to indicate; for, as the law has provided a definite successor, in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness." *Davis v. Davis, supra,* citing 1 Jarman on Wills, 326. The same doctrine, as we have stated, is recognized in the learned and exhaustive opinion of the Court in *Kerr v. Dougherty,* 79 N. Y., 327, where it is said: "The general rule is that in a will of personal property the general residuary clause carries whatever is not otherwise legally disposed of. But this rule does not apply where the bequest is of a *residue of a residue* and the first disposition fails. This was held in *Beekman v. Bonsor,* 23 N. Y., 298, 312, and as it was there laid down, quoting from the master of the rolls in *Skrymsher v. Northcote,* 1 Swanst., 570: 'It seems clear, on the authorities, that a part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts as a *residue of a residue;* but, instead of resuming the nature of residue, it devolves as undisposed of.' *Downing v. Marshall,* 23 N. Y., 382; *White v. Howard,* 46 *id.,* 144." See, also, *Riker v. Cornwell,* 113 N. Y., 125, where the following case is stated: "I give all my 3 per cents to A, and all the rest of my government stocks to B, and if the gift of the 3 per cents to A fails by lapse, will they go to B? It appears to me the answer must be in the negative, for it is quite clear that the rest of the government stocks was not a residuary bequest which could take in or include the particular thing which was given by a separate description to somebody else. * * * The failure of the first gift would not be for the benefit of the person to whom the other stocks are given," citing *Springett v. Jennings,* L. R., 6 Ch. App., 333. The general rule prevailing with us (*Simms v. Garrot,* 21 N. C., 395) is also there stated, as follows: "The doctrine is firmly established by the reported cases and by the text-books that, where the residuary bequest is not circumscribed by

clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accident." But not so when the residue is given out of a particular fund, as in our case, and is itself what is left after deducting certain sums from another residue. The amount going to the beneficiary of the last *residuum* is fixed by the terms of the will, as used by the testatrix at the time of its execution, and the final residue is described in certain and unmistakable language. *Peay v. Barber,* 1 Hill Ch., star p. 95 (10 So. Ca. Eq. Rep., 69). In *King v. Woodhull,* 3 Edw. Ch., 82, it is laid down that "to entitle a residuary legatee to the benefit of a lapsed or void bequest he must be a legatee of the residue generally, and not partially so; for, where it is manifest from the express words of the will that a gift of the residue is confined to the residue of a particular fund or a description of property, or to some certain *residuum,* he will be restricted to what is thus particularly given, since the legatee cannot take more than is fairly within the scope of the gift."

In *Winston v. Webb,* 62 N. C., 1, this Court held that when a residuary fund is given by will to the children of a certain person, to be equally divided between them *as a class*—that is, not naming them—and one of them die in the lifetime of the testator, his share will lapse for the benefit of the other residuary legatees; but if such a fund be given to the children, *not as a class,* but *nominatim,* to be equally divided between them, and one of them die before the testator, that share will lapse, but will not fall into the residue for the benefit of the other children, whose shares, it is said, cannot be enlarged by such event, citing several cases, which cases show, says the Court, that the lapsed residuary share is undisposed of by the will and must be distributed among the next of kin. The legacy to the church in this case is specific, according to the authorities. *Johnson v. Johnson,* 38 N. C.,

426; *Everett v. Lane,* 37 N. C., 548; *Perry v. Maxwell,* 17 N. C., 488; *Morisey v. Brown,* 144 N. C., 154. It is true the exact amount of it was not determined at the time it was given by the will, but, under the maxim, *Id certum est quod certum reddi potest,* it could be rendered certain by deducting from the proceeds of the sale the amount of the other legacies and the sum of $700 mentioned in item 2. The balance, increased by the amount of the legacy given to the testatrix's brother, Frank Haywood, is the residue intended for the church, subject, of course, to costs and expenses of administration.

We do not think the case of *Simms v. Garrot,* 21 N. C., 395, so confidently relied on by the defendants, is an authority in point or sustains their contention. There the Court merely decided that a lapsed general legacy did not fall into a residue which was only partial in its nature. But we are of the opinion that on the face of this will there are clear indications of what the true intention of the testatrix was. It is evident that she was not *inops consilii,* but was acting under the advice and guidance of some one very learned in the law. The fact that she made specific provision that the legacy given to her brother, who was old at the time she executed her will, should fall into the residue bequeathed to the church tends strongly to show that she knew what would be the legal consequence if no such provision had been made by her. If she thought that it would go to the church if no special disposition was made of it in the event of a lapse, why insert such a provision in the will? If she thought it would not go to the church, but would lapse as a legacy and go to the next of kin, it would be strange indeed that she did not make a similar provision in regard to the other legacies or any one of them, if she intended the share of the church to be augmented by a lapse. The difference in the ages of her brother and her nephews cannot materially affect or weaken this reasoning. One of her nephews, John Bryan, did predecease her, and if

it was her purpose that his share should fall into the partial residue given to the church, why was not the will changed so as to effectuate this purpose, not merely to provide for a contingency, as she had done in the case of her brother, but for an event which had actually occurred? Her silence with respect to the Bryan legacy after it had lapsed by his death, together with the other reason first assigned, while perhaps not controlling in construing the will, should have their weight in ascertaining what was the will—the intent—of the testatrix. There are other and perhaps stronger reasons available to the next of kin of the testatrix to establish the correctness of their contention, but those already given we deem sufficient for the purpose.

We hold that there was a conversion of the lots into personalty by the sale thereof under the terms of the will (*Benbow v. Moore,* 114 N. C., 263; *Duckworth v. Jordan,* 138 N. C., 520), and the legacy to John Bryan lapsed by his death in the lifetime of the testatrix. His intended share must therefore be distributed among her next of kin. This accords with the ruling of the learned Judge who heard the case below. We have carefully examined all the authorities cited by the counsel for the church, and do not think they should change our view of the case.

Affirmed.

JAMES I. BEACH, ADMINISTRATOR OF TAYLOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 29 May, 1908.)

1. Railroads—Trespassers—Negligence, Concurrent—"Look and Listen."

It is the duty of a trespasser upon a railroad track both to look and listen for approaching trains, and when by looking the injury complained of would have been avoided, his negligence in this respect is concurrent, and damages are not recoverable by him incurred on that account.

2. Same.

An engineer on a moving train has the right to expect that a trespasser on the track has exercised due care in looking as well as listening for approaching trains; and, though there may have been observed by him an engine standing near the place of the injury, which was evidently making noises to interfere with hearing the approach of his train, the duty of the trespasser to look is not diminished, but increased.

3. Same—Nonsuit.

When it is shown by the evidence that plaintiff's intestates were trespassers on defendant's railroad track, walking in front of an approaching train in the direction the train was moving; that it was a bright day and the track of defendant was straight at that place; that there was no obstruction to prevent their seeing the train for a distance of from one-half to three-fourths of a mile, or the engineer from seeing them; that the engineer, on approaching, seeing they did not leave the track, sounded the danger signal and applied the brakes in a fruitless effort to avoid killing them; that the engineer saw an engine standing near the place of the accident, and before it occurred, evidently making noises to prevent their hearing the approaching train, a motion as of nonsuit upon the evidence was properly sustained.

ACTION tried before *Guion, J.*, and a jury, at June Term, 1907, of BURKE.

The intestates of the plaintiff were run over and killed at the same time by a passenger train while they were walking on the track of the defendant, at a point about 300 yards west of the depot at Morganton. The accident occurred about 10 o'clock A. M. on the morning of 5 December, 1905, a clear,

bright day, and at a point on defendant's road where they might have seen the approaching train for a distance of from one-half to three-fourths of a mile before it reached them, the track being straight and unobstructed for at least that distance. The roadbed runs almost due east and west at this point, and the intestates were walking east along and on the track, while the morning passenger train was coming from the west and moving in the same direction in which the intestates were walking. The station signal was sounded at the signal board, just one mile west of the depot; the highway crossing signal given just east of this point, and the engineer, on approaching intestates, who were walking along the track in front of the train, seeing that they didn't step from the track, sounded the danger signal and applied the brakes in the effort to stop the train, but before he could do so the engine came in collision with intestates and inflicted the injuries of which they died. The bell had been turned on when the station signal was given, and was ringing automatically from that point. At the point where the intestates were stricken the road runs through a cut about twenty-five feet deep and from twenty to thirty feet wide at the bottom and from forty to sixty feet wide at the top, and along the main line and on the south side and at a distance of eight or ten feet a side track runs parallel with the main line for some distance. On this side track and near where the intestates were walking there stood a freight train with engine attached, from which engine some smoke and steam were escaping, making a noise, which, it was contended, prevented the intestates, who were walking on the main line, from hearing the approach of the passenger train on the main line or the signals given by it. The track was straight and unobstructed, and there was nothing to prevent the engineer in charge of the engine pulling this train from seeing the intestates walking on the track ahead of him after he had gotten within a distance of one-half a mile of them, and nothing to prevent the intestates from seeing him.

These were the facts as testified to by all the witnesses, and there was no material conflict in the evidence except as to the distance within which the train had approached the intestates when the danger signal was repeatedly sounded and the brakes applied in the effort to stop the train before it came in collision with the intestates, and as to whether the intestates were walking between the rails or outside of the rails, some of the plaintiff's witnesses differing as to this.

The plaintiff contended that the steam and smoke escaping from the freight engine on the side track was notice to the engineer in charge of the passenger train, from which he should have drawn the inference that the intestates, who were walking on the main line, could not hear the approaching train, and therefore he should have stopped the train until the intestates had left the track; while the defendant contended that the engineer had a right to assume that the intestates had looked and had notice of the approach of the train, and to act on the assumption that they would clear the track in time to avert the injury.

The court charged the jury, among other instructions given, and at the request of the plaintiff's counsel, "that, in order to answer the issue as to defendant's negligence affirmatively, the jury must find from the greater weight of the testimony that the engineer, Keever, knew when approaching the intestates on the track, and in time to have stopped his engine by the use of appliances at his command before coming in contact with them, that it was impossible for them to hear the noise of the approaching train or signals, where they were walking on the track, on account of the noise made in the cut by the engine of the freight train standing on the side track."

The engineer, Daniel Keever, testified as follows: That he had been an engineer, running on this road, since 1887. He was running the engine of the train coming from the west, which killed intestates. He could see the men on the track and they could see his engine at another bridge three-quarters

of a mile west of the bridge where they were killed, and that he gave the station blow there. He blew for the road crossing when he first saw them, just west of the tannery crossing; that the two men seemed unconcerned and paid no attention to the alarms given—did not look around; that he could see that the engine on the side track was under steam, but could not see it was making any unusual noise; that it was blowing off steam and that he could see the steam rising and smoke also from the engine, and knew it was obliged to make some noise; that he saw the engine on the siding when he passed the tannery (five hundred yards from it), and that he saw the men on the track when he was west of the tannery, and when at the same point saw the freight engine on the side track. He gave the signal one hundred and twenty or one hundred and thirty feet before he reached the intestates; that people usually got off sixty to eighty feet before he reached them. He attempted to stop the train as soon as he could after he saw they were not getting off. He stopped the train in about two hundred and eighty feet and applied the emergency brakes for three hundred feet, perhaps; that he "would consider two hundred and eighty feet or three hundred feet an extra good stop."

Joseph R. Patton, one of the witnesses for the plaintiff, testified that the train, with the appliances in use and under the engineer's control, could, in his opinion, have been stopped within one hundred yards.

The defendant moved to nonsuit the plaintiff, under the statute. The motion was refused, and defendant excepted. There was a verdict for the plaintiff upon the issues submitted to the jury. Judgment having been pronounced thereon, the defendant appealed.

A. C. Avery and *Shepherd & Shepherd* for plaintiff.

S. J. Ervin for defendant.

WALKER, J. The question involved in this case has been before this Court so many times that the law applicable to the facts as disclosed by the record has been as conclusively settled as perhaps any principle within the wide range of jurisprudence. The theory of the plaintiff, which was adopted by the court, proceeds upon the erroneous idea that a man who goes upon the track of a railroad company, not by its permission or license, but as a mere trespasser, is not bound to use both senses of sight and hearing, but only the latter. Every man in the possession of his natural faculties must know, and the law will not hear him say he does not know, that a railroad track is a place of constant and almost imminent danger. If he chooses to use it as a footway when he is not expressly or impliedly invited to do so, he must understand that he does so at his peril, and that he will at all times be menaced by trains moving to and fro upon the track. Generally speaking, a railroad track is intended for the running and operation of trains, and not for a walkway, and the company owning the track has the right, unless it has in some way restricted that right, to the full and unimpeded use of it. The public have rights as well as the individual, and usually the former are considered superior to the latter. That private convenience must yield to the public good and public accommodation is an ancient maxim of the law. If we should for a moment listen with favor to the argument and eventually establish the principle that an engineer must stop or even slacken his speed until it may suit the convenience of a trespasser on the track to get off, the operation of railroads would be seriously retarded, if not practically impossible, and the injury to the public might be incalculable. The prior right to the use of the track is in the railway as between it and a trespasser who is apparently in possession of his senses and easily able to step off the track. This is a most reasonable rule, and if it should at this late day be abrogated we would reverse one of the most salutary and fundamental maxims of

the law. Every man must so use his own property as not to injure another, but this does not mean that a trespasser on a railroad track has any right to prevent the proper use of its track by a railway company. If an engineer sees that a person on the track, even though he be a trespasser, is not in the possession of either of his senses of sight or hearing, and therefore is unable to take care of himself, the maxim applies, and he must at once adopt such measures as common prudence requires to take care of him and to see that he is not injured. He must, of course, keep a constant lookout ahead, as a general rule, for, while no person has the right to use the track as a footway, except in the instances we have mentioned, if he does so use it and is lying helpless on the track, or is blind and deaf or otherwise unable to take care of himself, and this will appear to the engineer if he exercises ordinary prudence, common humanity requires, and so does the law, that he should use such precautions to prevent injury to him as the situation and circumstances would suggest to a prudent man. The trespasser cannot be killed or even injured because he has committed a legal wrong in going upon the track, if he is not in the possession, at the time, of the ability to care for himself and the engineer knows it, or should know it, if he is careful in the performance of his duties. If a trespasser on a railway track can by the exercise of due care see an approaching train in time to leave his place of danger, or if he can hear the train in time for that purpose, he must use the senses and faculties with which he has been endowed and leave the track; otherwise he becomes the author of any injury he may receive, and has no right in law to complain of the railway company. *Volunti non fit injuria.* The engineer has the right to presume, even up to the last moment, when it is too late to save him, that he will leave the track in due time, provided he appears to have possession of his ordinary faculties and of the sense of sight or hearing and is so situated that he can use them for his own safety. It is useless to discuss so plain a

proposition of law, and if it is applicable to the facts of this case the court erred in refusing the nonsuit. We entertain no doubt that the actual decisions of this Court upon a similar if not an identical state of facts show that this case falls within the principle, and therefore the rulings and charge of the court were erroneous. The most recent case, perhaps, is *Bessent v. Railway,* 132 N. C., 934, where we said: "All the evidence in this case, as we have stated, was introduced by the plaintiff, and there is no contradiction in it. It is plain, direct and conclusive in establishing negligence on the part of the plaintiff's intestate, which was the proximate cause of her death. It can make no difference whether he failed to show negligence of the defendant, or whether, having shown such negligence, he has also shown by his own proof that the intestate's negligence was concurrent up to the last moment with that of the defendant, or that, after the defendant was seen or could have been seen to be negligent, the intestate had the last clear chance to avoid the injury. In either case the plaintiff would not be entitled to recover. The case discloses that the situation of the plaintiff's intestate was such as enabled her to see and hear the train as it approached her in ample time for her to have left the track and averted the injury which caused her death. We are unable to distinguish this case from *Neal v. Railroad, supra.* * * * The plaintiff's intestate was walking along the defendant's track in the daytime, with nothing, so far as it appears, to obstruct her view and nothing to prevent her hearing the whistle or the noise made by the train. * * * Everybody else saw and heard the train and left the track, and why was she not guilty of negligence in not doing what they did, and did easily? She had equal opportunity with them, and her failure to avail herself of it was an omission of duty on her part, which was necessarily the direct and proximate cause of her injury and death. The wrong, therefore, cannot in any view of the testimony and in the contemplation of law be imputed to the

defendant, even though it may have been guilty of negligence." After citing the cases, the Court proceeds: "According to the principle declared in all of them, the question of liability is not to be solved by any reference to what the defendant may have done or omitted to do, but by the conduct of the plaintiff; and if the latter would not see when he could see, or would not hear when he could hear, and remained on the track in reckless disregard to his own safety, the law adjudges any injuries he may have received to be the result of his own negligence," citing the following cases: *Parker v. Railroad,* 86 N. C., 221; *Meredith v. Railroad,* 108 N. C., 616; *Norwood v. Railroad,* 111 N. C., 236; *Syme v. Railroad,* 113 N. C., 565; *Stuart v. Railroad,* 128 N. C., 518; *Wycoff v. Railroad,* 126 N. C., 1152; *Sheldon v. Asheville,* 119 N. C., 606; *Ellerbee v. Railroad,* 118 N. C., 1024.

In *Lea v. Railroad,* 129 N. C., 459, the same principle is thus stated: "The intestate was not killed at a street crossing nor on a track much used, even as a footway. The case does not fall under any of the exceptions that require that the whistle should be sounded or the bell should be rung or the train stopped. * * * The doctrine of the last clear chance—proximate cause—does not arise in this case. Both were guilty of negligence and both were on equal terms. The intestate was at no disadvantage. He was on equal opportunities with defendant. *Neal v. Railroad,* 126 N. C., 639. The intestate was unfortunately killed, but it will not do to say that the railroad company is liable in damages for every man killed by its trains. So far as we remember, every principle involved in this case is decided in *Neal's case,* and that case must control this case. We do not think the plaintiff was entitled to recover upon the evidence." It may be well to state here what the Court said in *Neal v. Railroad, supra,* as it is considered a leading case: "If plaintiff's intestate was walking upon defendant's road in open daylight, on a straight piece of road, where he could have seen defendant's

train for one hundred and fifty yards, and was run over and injured, he was guilty of negligence. And, although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, and in not keeping a lookout by its engineer, as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate. It has been so held in *Meredith v. Railroad,* 108 N. C., 616; *Norwood v. Railroad,* 111 N. C., 236; *High v. Railroad,* 112 N. C., 385. Those cases held that it was not negligence in a railroad company where its train runs over a man walking on a railroad track, who is apparently in possession of his faculties and in the absence of any reason to suppose that he is not. This is put upon the ground that the engineer may reasonably assume that the man will step off in time to prevent injury. In *McAdoo v. Railroad,* 105 N. C., 140, this doctrine is expressly established, and it is held (as law) in that case that, on account of plaintiff's negligence in standing on the road and allowing defendant's train to run over him, there was concurrent negligence which prevented him from recovering damages. *McAdoo v. Railroad* has been cited and approved on this point in *Syme v. Railroad,* 113 N. C., 565, and in *Smith v. Railroad,* 114 N. C., 744, and many other cases."

The concurring opinion of *Chief Justice Faircloth* puts our case exactly: "We concur with the Judge below in the opinion that the plaintiff was not entitled to recover, because, by the undisputed facts, considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servants of the defendant were not in fault in acting on the belief that the plaintiff would get out of the way of the engine before it would reach him." But perhaps the law, as applicable to the special facts of this case, has been stated as strongly and as clearly by *Justice Avery* in the following opinions, where he was speaking for the Court, as in any we could possibly cite. In *McAdoo*

v. Railway, 105 N. C., 140, the Court said: "When a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can by looking along the track see the moving train which, in his attempt to blindly cross the road, injures him. Even where it is conceded that one is not a trespasser, as in our case, in using the track as a footway from a foundry to his home, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the progress of the trains. The railroad company has a right to the use of its track, and its servants are justified in assuming that a human being who has the use of all his senses will step off the track before the train reaches him. According to the plaintiff's own testimony, he stood upon the track, with his back to the engine, and did not see it till after he was stricken by it. He was, therefore, in any aspect of the case, negligent, and the jury would not have been warranted in finding that the defendant could have prevented the injury by using ordinary care. * * * It is manifest that a reduction of the speed would not have prevented the injury by enabling the plaintiff to see, with his face turned in the opposite direction." That decision, as will *plainly* appear, goes *far* beyond what is necessary to hold in this case in order to decide against the plaintiff. In *Norwood v. Railroad,* 111 N. C., 236, it was said: "When he (the trespasser) placed himself in a position where he was liable to be stricken by a passing engine it was his duty to *keep a sharp lookout*, and if he carelessly, recklessly or in a drunken stupor remained on the track when the engine was approaching and till it came in contact with him, he was negligent. If the engineer was negligent in failing to blow at the crossing or on approaching the bridge, intestate's subsequent refusal or failure to get off the track was nevertheless the proximate cause of the injury sustained, unless it can be

reasonably inferred from the testimony that, after intestate went upon the track, the engineer did see or could by ordinary care have seen, *not simply that he was on the track,* but that he had placed himself in peril by going upon the bridge, or appeared to be lying drunk or insensible in the way of the engine. If it were conceded that the engineer saw the deceased walking along the track, he was justified in believing, up to the last moment, in the absence of knowledge or information that he was insane or deaf, that intestate would take reasonable precaution for his own safety by moving out of the way." So, in *Meredith v. Railway,* 108 N. C., 616: "Where the engineer in charge of a moving engine sees a human being walking along the track in front of it, if such person is unknown to him and is apparently old enough to understand the necessity for care and watchfulness, under such circumstances the engineer may act upon the assumption that he will step off the track in time to avoid injury." *McAdoo v. Railway,* 105 N. C., 140; *Parker v. Railway,* 86 N. C., 221. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety, *even when trains were moving on three parallel tracks,* if there was manifestly an opportunity of escape by walking across the railroad to a neighboring track. *Daily v. Railroad,* 106 N. C., 301. The fact that there was no other possible road for persons walking from Paint Rock to Hot Springs would not relieve a man or boy of his age endowed with reason and the instinct of self-preservation from the duty of watchfulness, when he must know and must be always mindful that carelessness will expose him to danger. The boy injured was described by witnesses as bright and smart, but if he was apparently capable of appreciating his peril or his situation it is sufficient to relieve the servants of this company from the imputation of carelessness in assuming that he would step aside before the engine reached him. Considerations of public policy, such as

a reasonable demand for the speedy transportation of mails and the proper regard for the safety of passengers, forbid that trains should be stopped for trivial causes, or that the lives of those on board should be put in jeopardy even to avert manifest danger to others. We concur with the Judge below in the opinion that the plaintiff was not entitled to recover, because by the undisputed facts, considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servants of the defendant were not in fault in acting on the belief that plaintiff would move out of the way before it could reach him." In *High v. Railway,* 112 N. C., 385, where it appeared that a woman wearing a poke bonnet which extended beyond her face had gone upon the track and was apparently oblivious of the approach of the train, as much so as was the intestate in this case, though she was in possession of her faculties and senses and able to leave the track by taking one or two steps, the same able and learned Judge said: "Where an engineer sees on the track, in front of the engine on which he is moving, a person, walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury; and if such person is injured the law imputes it to his own negligence and holds the railroad company blameless. *Meredith v. Railroad,* 108 N. C., 616; *Norwood v. Railroad,* 111 N. C., 236. The failure of the engineer to keep a strict lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to pursue such a course of conduct as would have averted injury. Whether he saw the plaintiff at a distance of one hundred and fifty yards or of ten feet, he was not at fault in acting on the supposition that she would still get out of the way. If the plaintiff had looked and listened for approach-

ing trains, as a person using a track for a footway should in the exercise of ordinary care always do, she would have seen that the train, contrary to the usual custom, was moving on the siding. The facts that it was a windy day and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful." But the case of *Syme v. Railway,* 113 N. C., 558, would seem to be fatal to the contention of the plaintiff's counsel that, because the intestate may at the time of the injury have been deprived of one of his senses, namely, that of hearing, by the noise of the engine close to him, which was discharging steam, he was excused from using his sense of sight. The Court, with reference to a state of facts substantially the same as are stated in this record, says: "Counsel for plaintiff did not contend that the intestate was deficient in any of his senses or wanting in physical power or mental faculties, and if they had there would have been no evidence to support the contention. *A priori,* the engineer had no reason to think him other than a man possessed of all of the usual powers of mind and body, and was warranted in assuming that he would step off the track and avoid a collision, until it was too late to save him. *High v. Railroad,* 112 N. C., 385. When a person is injured while walking on a railroad track by an engine that he may have seen by looking, the law, as a rule, imputes the injury to his own negligence. *Meredith v. Railroad,* 108 N. C., 616; *Norwood v. Railroad,* 111 N. C., 236. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of a want of ordinary care on the part of the defendant, while in any aspect of the case the plaintiff's intestate was negligent in getting upon the track, in front of the engine, without looking, and exposing his person to injury, when he might have seen that it was approaching and have avoided the collision by

stepping off the track. We cannot yield to the ingenious suggestion of the able counsel for the plaintiff, that the engineer must have seen the long freight train and known the fact that the engine was 'exhausting heavily,' so as to render intestate as insensible to the approach of the other train as if he had been deaf, and that therefore the defendant's engineer was negligent in not attempting earlier to stop the engine. But it was the duty of the intestate to look as well as listen, under the circumstances, and he was negligent if he failed to use his eyes as well as his ears. *McAdoo's case, supra.* On the other hand, the engineer was justified in assuming that intestate had looked, had notice of his approach and would clear the track in ample time to save himself from harm." The case of *Pharr v. Railway,* 133 N. C., 610, approves *Symes' case, Neal's case, Lea's case* and *Bessent's case*, and the Court, in commenting upon them with reference to the facts of the case then under consideration, says: "If the defendant was negligent in not giving a signal sound, the act of the plaintiff was much greater carelessness and was the immediate cause of the injury, and he cannot be excused for such disregard of his personal safety. * * * If the plaintiff's intestate was walking upon the defendant's road in open daylight, on a straight piece of road, where he could have seen the defendant's train for one hundred and fifty yards, and was run over and injured, he was guilty of negligence. And, although the defendant may also have been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer, as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate," quoting the last part of the extract we have taken from the case, *Neal v. Railway, supra.*

Perhaps no court has expressed itself in more certain and unmistakable terms upon this subject than this one, and with

more unanimity. The principle has been often announced, and applied to facts not essentially different from those in this case, that where a person on the track as a trespasser is apparently in possession of his senses and faculties, so that he can either hear or see the approach of a train, he must listen, and if he cannot hear he must look, for the approach of trains, and his failure to do so is negligence on his part, which at least concurs, up to the very time of the injury, with that of the defendant, the railway company, if there be any negligence on its part, and he must be considered in law and, we add, by every rule of justice, common fairness and common sense, to have brought disaster upon himself, if he is injured and killed. The rule, as stated in our decisions, and we restate and approve it now, is not one peculiar to this Court. It has been generally, if not universally, adopted by all the courts, and is thus epitomized in 3 Elliott on Railroads, sec. 1257a: "The company's employees may presume that one who is apparently able to do so will get off the track in time to avoid injury to himself."

We see nothing of a special nature in this record to except this case from the operation of the rule of law which has been so repeatedly applied to cases of its kind. Indeed, if anything, it is one that calls for a strict adherence to that rule. Here the engineer gave the signals at the crossings and also the danger signal, and apparently did everything that a cautious and prudent man would do under the circumstances. He perhaps did more than was required of him, so far as any duty was owing by the company to the intestate. *Morrow v. Railway*, 147 N. C., 623. The intestate, notwithstanding the engine was exhausting steam, on a track close by him, even if that deafened him so that he could not hear the train as it approached, had the sense of sight left, which was just as available to him in averting injury to himself, if he had exercised the least degree of care, as the sense of hearing would have been if there had been no noise. His own negligence

caused his death, and not that of the engineer. The use of his sense of sight would have saved him, and the engineer had the right to presume, even up to the last moment (as *Justice Avery* says in the cases we have cited), when his efforts to stop his train in time to save him proved unavailing, that he had made use of it and would clear the track before the train reached him. *Crenshaw v. Railway,* 144 N. C., 314. The plaintiff certainly has no better ground for asking a recovery than Mrs. Crenshaw had in the case just cited. There was some evidence that trespassers on the track often waited until a train was very near them before stepping off the track.

We entertain no doubt that, upon principle and authority, in any view we can reasonably take of the evidence, the plaintiff has wholly failed to show any actionable negligence on the part of the defendant, but he has shown such negligence of his intestate as clearly bars his recovery. We have discussed the question involved at much length, as counsel for the plaintiff earnestly and seriously challenged the application of the settled principle of law to this case.

The court should have sustained the motion to nonsuit and have dismissed the action.

Reversed.

JAMES I. BEACH, ADMINISTRATOR OF WISENHAUNT, v. SOUTHERN RAILWAY COMPANY.

(Filed 29 May, 1908.)

For digest, see next preceding case, with same title.

ACTION tried before *Guion, J.*, and a jury, at June Term, 1907, of BURKE.

A. C. Avery and *Shepherd & Shepherd* for plaintiff.
S. J. Ervin for defendant.

WALKER, J. This case is in all essential respects like that of the case having the same title decided at this term. The plaintiff's intestate was killed at the same time as was the intestate of the plaintiff in that case, and under the same circumstances. Our decision in this case is therefore the same as in that one. The rulings and judgment of the court as to the defendant's liability to the plaintiff were erroneous, and the motion to nonsuit should have been sustained and the action dismissed.

Reversed.

W. P. BLACK v. ATLANTIC HOME INSURANCE COMPANY.

(Filed 30 May, 1908.)

1. **Fire Insurance—Policies—Standard Form—Additional Insurance—Conditions Valid.**

The condition expressed in the statutory standard form of a fire insurance policy, that additional insurance upon the property covered by the policy without the assent of the insurer will render the policy void, is valid and enforcible.

2. **Same—Waiver.**

The condition expressed in the statutory standard form of a fire insurance policy, that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy," etc., "unless such waiver, if any, shall be written upon or attached hereto," does not restrict the power

of such officers, etc., to waive such condition, but establishes an invariable rule of evidence as to such waiver and renders parol evidence thereof inadmissible.

3. Fire Insurance—Contracts—Additional Insurance—Notice.

Notice that the insured intended to take out additional insurance in the future is not notice of existing insurance at the time of contract.

HOKE, J., dissenting *arguendo;* CLARK, C. J., concurring in the dissenting opinion.

ACTION tried before *Peebles, J.,* and a jury, at March Term, 1908, of BUNCOMBE.

Defendant insurance company, through its agents at Asheville, N. C., on 29 December, 1905, issued to plaintiff its policy of insurance against loss or damage by fire, to the amount of $1,900, on certain property, fully described therein. The policy was of the standard form set out in full in Revisal of 1905, secs. 4759, 4760, and contained the following provisions: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered, in whole or in part, by this policy." The policy contains this further clause: "This policy is made and accepted upon the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, *and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto;* and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, *unless such waiver, if any, shall be written upon or attached hereto,* nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." All

of which is contained in the "standard policy" prescribed in the statute. On 4 January, 1906, another policy was issued by the German Fire Insurance Company on said property for $500. On 9 January, 1906, the property covered by the policies was destroyed by fire. It was conceded that no consent by defendant was endorsed on the policy of 29 December, 1905, to the issuance of the policy of 4 January, 1906. The property, as found by the jury, was worth $3,274.

The following, among other issues, was submitted to the jury: "Was there a waiver by the defendant of the condition in the policy as to the additional insurance issued by the German Insurance Company?" Plaintiff introduced parol evidence for the purpose of showing a waiver by defendant of the condition in regard to the additional insurance.

His Honor, upon the conclusion of the evidence, charged the jury that there was no evidence that the defendant waived the provision in the policy in regard to taking out additional insurance in the German Insurance Company, and instructed them to answer the issue "No." Plaintiff excepted. Judgment was rendered for defendant, and plaintiff duly excepted and appealed.

Zebulon Weaver and *H. B. Carter* for plaintiff.
Tillett & Guthrie for defendant.

CONNOR, J., after stating the facts: The principal question presented is whether parol evidence is admissible to show a waiver of the condition avoiding the policy by reason of taking the additional insurance 4 January, 1906. The condition expressed in the policy, that other insurance taken upon the property without the assent of the insurer would render the policy void, is valid and, unless waived, will be enforced. *Sugg v. Insurance Co.*, 98 N. C., 143. The language of the contract is explicit and incapable of misunderstanding, leaving no room for construction. Assuming, for the purpose of the argument, that the agent who issued the policy comes

within the definition of a general agent, with power to bind the company in respect to the policy issued by him, as held in *Grubbs v. Insurance Co.*, 108 N. C., 472, the plaintiff is confronted with the express provision in the face of the policy, the form of which is prescribed by the statute, that no officer, agent or representative of the company shall have power to waive any provision or condition except such as by the terms of the agreement is "endorsed hereon or added hereto," and as to these no officer, agent, etc., shall have such power or be deemed or held to have waived such condition unless the waiver, if any, shall be *"written upon or attached hereto,"* nor shall any privilege or permission exist or be claimed by the insured unless so written or attached. There can be no controversy regarding the meaning of these words. They are inserted in the policy, not by the company or by the plaintiff, but by the statute. To fail to give them force and effect is to nullify the statute. They are not intended to restrict the powers, express or implied, of general or local agents, but to prescribe an invariable rule of evidence by which their conduct must be proven to bind the company. Prior to the enactment of the statute much controversy arose as to the reasonableness of conditions or provisions inserted in policies. In many cases, by reason of the obscure language, manner and place of insertion and unfairness to the insured, the courts held them unreasonable and invalid. The conduct and language of agents, together with the extent of their power, rendered the rights and duties of the company and the insured uncertain and insecure. The courts, for the prevention of fraud and injustice, construed such provisions most strongly against the insurer, and, to prevent forfeitures, were industrious to find waivers in the conduct and language of agents. This is apparent from the decided cases in our own and the reports of other courts. To avoid these controversies, frequently resulting in long and, to the insured, ruinous litigation, the Legislatures of this and other States enacted the

"standard policy" and forbade the use of any other. The Legislature of this State in 1899 enacted a statute codifying the insurance law and adopting the "standard policy," prescribing the size of type in which it shall be printed, etc. For issuing any other form of policy the company and its agents are made indictable. Sections 4762-4833, Revisal. The courts of other States in which this form of policy is prescribed have uniformly held that its terms and provisions are binding upon the company and the insured. The question presented upon this appeal was decided in *Quinlan v. Insurance Co.*, 133 N. Y., 356, *Andrews, J.*, saying: "No principle is better settled in the law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a prescribed and limited authority and his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of one as well as the other." Referring to the facts in that case, he says: "The limitations upon the authority of K. were written on the face of the policy," copying the language found in the "standard policy." Again he says: "When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written endorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so endorsed is void." This is a manifestly correct statement of the law. The learned Justice proceeds to point out the evils which the enactment of the standard policy was intended to avoid, saying: "The act providing for a uniform policy, known as the 'standard policy,' and which makes its use compulsory upon insurance companies, marks a most important and useful advance in legislation relating to contracts of insurance." *Moore v. H. F. Insurance Co.*, 141 N. Y., 219. In *Bourgeois v. National Insurance Co.*, 86

Wis., 606, *Winslow, J.*, referring to the enactment requiring the use of the standard policy, says: "The act is broad and sweeping in its terms and scope. It brings order out of chaos. Prior to its passage there were as many contracts as there were companies. The variations and differences between the conditions of the policies issued by the various insurance companies were almost infinite in number; new clauses and conditions were being constantly inserted, generally ingeniously worded and obscurely inserted. To meet this condition the act under consideration was passed. That it is a long step in the right direction cannot be doubted. * * * The condition here broken was one of the conditions of the standard policy. It is claimed that it was waived, not in printing or writing, but by mere word of mouth. Can this be successfully maintained? If so, then this part of the law is at once emasculated." In *Parker v. Rochester German Insurance Co.*, 162 Mass., 479, discussing an alleged waiver of a condition in a standard policy adopted by the General Assembly, it is said: "There is nothing to show that the agents had any authority to vary the standard form; but if they had it would seem probable that they could only do so by inserting provisions or attaching slips in the manner prescribed by the statute." In *Anderson v. Insurance Co.*, 28 L. R. A. (Minn.), 609, while the case was disposed of upon other grounds, the Chief Justice states clearly the principle which should govern the courts in dealing with the statutory standard policy: "But in respect to the power of the parties to insert the provisions and conditions that are contained in the standard policy, and the binding effect of them, the act is conclusive, for it would be absurd to say that, while the same statute compels the use of a particular condition, the parties cannot or shall not bind themselves by it, but it may be nugatory." "The conditions of the standard policy cannot be waived, except as provided therein and written or printed on the face of the policy." 13 Am. and Eng. Enc., 223, citing

a large number of cases. The decisions appear to be uniform upon the point. In *Assurance Co. v. Building Association,* 183 U. S., 308, an exhaustive description, with a review of the authorities, is made by *Mr. Justice Shiras.* If the enforcement of this provision works injustice, the Legislature may change the law. As it is written, it is our province to enforce it. We have avoided any discussion of the extent and character of the authority of the agents of defendant, or what conduct will or will not operate as a waiver. We confine our decision to the language of the statutory policy, holding, with his Honor, that there was a breach of the condition in regard to subsequent insurance, and that the waiver can be shown only in the manner contracted between the parties, as prescribed by the statute. The Legislature has, as a matter of public policy, restricted the freedom of contract and compelled the parties to contract in the exact language prescribed. While a contract of insurance may be made in parol, the statute will enter into and prescribe its forms—that is, the parol contract will be construed to be for a standard policy. If, listening to the suggestion of "hard cases," said to be the "quicksands of the law," we nullify the statute, we not only make a new and different contract for the parties, but make the law of none effect. The notice that the plaintiff intended to get other insurance in the future is not notice of existing insurance at the time the policy issued. The distinction is marked and radical. We do not think that it can be said that the agent of the company was acting as the agent of the plaintiff. This would make confusion worse confounded. Upon a careful review of the entire record we find no error. The judgment must be

Affirmed.

HOKE, J., dissenting: While the conclusion reached by the Court on the specific question decided may not be in itself undesirable, I believe that the opinion proceeds upon a wrong

principle and involves an erroneous construction of the statute—a construction that may in many instances lead to unlooked-for and harmful results.

In the decision, as I understand it, the Court holds, and intends to hold, that there can be no waiver of any provision or requirement of the policy by any agent, general or special, unless the same is made in writing and attached to the policy or written thereon, because the Legislature by statute provided a standard form for fire insurance (Revisal, secs. 4759, 4760), and it appears therein as one of the stipulations that "no officer, agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement endorsed thereon or added thereto; and as to such provisions and conditions no officer, agent or other representative of the company shall have such power or be deemed to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached thereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The position maintained by the Court, it seems to me, would have more force if the statute establishing this form was exclusive in its terms, providing that no other than the form set out should be valid and binding, but this is not at all true. It is well known that, before the enactment of the statute by which this form was established, some insurance companies were accustomed to issue policies containing manifold stipulations and conditions, elaborate in statement and intricate in meaning, printed, too, usually in very fine type and being often obscure and at times contradictory. They were difficult to read and still more difficult to understand. As a matter of fact, we know they were usually not read in full, and, moreover, in case of loss these stipulations were not infrequently made the basis of unconscionable defenses, involving both

delay and cost, and terminating at times in an entire loss—a result that was unjust and could ill be borne. While this form was enacted no doubt with the desire and intent to be just to both parties to these contracts, it was well understood to be the primary purpose of this statute to protect the insured from the untoward effects of these numerous and intricate stipulations to which I have referred.

The sections in question bear in terms upon the companies. "No fire insurance company shall issue fire insurance policies on property in this State other than those of the standard form." And as a further indication that it was the companies, and not the insured, that were brought within the effects and restrictions of the statute, it further enacts in express terms (section 4762): "Any insurance company which shall cause to be issued, and any agent who shall make, issue or deliver a policy of fire insurance other than the standard form of fire insurance policy, in willful violation of this chapter, shall be punished as by law provided, *but such policy shall nevertheless be binding upon the company issuing the same.*" This being the controlling purpose of the statute, and being only affirmative in terms, so far as the insured is concerned, it was never intended to impair or in any way affect the doctrine of waiver, as established by numerous and well-considered decisions of this and other courts of recognized authority, notably, with us, *Grabbs v. Insurance Co.*, 125 N. C., 389; *Grubbs v. Insurance Co.*, 108 N. C., 472.

This whole doctrine of waiver proceeds on the idea that it contravenes the stipulations contained in the policy. Formerly the conditions and stipulations were much more extended, and provided frequently that no stipulation of the policy could be waived by an agent at all. This was a valid provision, as a rule, and yet the courts held that it could be waived by the company, acting through its general agents. As shown in the cases cited, *supra*, these general agents, when acting within the scope of their powers, are as the company

itself, and, as they could make the contract, the statute not being prohibitory, they could alter or waive any or all of its provisions.

It is said in the opinion that the statute does not, and does not intend to, destroy this doctrine of waiver or the principles upon which it rests, but only provides a method by which alone such waiver may be established; and in the argument the case was likened to the statute which requires certain contracts concerning land to be in writing. The fallacy of the argument consists in the assumption that the statute establishes the *only* way by which waiver can be established, and the reference to the statute on contracts will illustrate the distinction I am endeavoring to state. In the statute as to land the provision is exclusive in its terms—contracts concerning land of a certain kind are void unless in writing. The statute on insurance says, in effect, to the companies: "If you place any stipulations in your contracts except those specified, you shall not take advantage of them, but any other contract of insurance you may make shall be binding on you." Accordingly, it is very generally held that companies may bind themselves in an insurance contract by parol, and, as they may do this, so they may alter or waive any or all stipulations by conduct. These same courts, whose decisions are cited and relied on to the effect that, when a standard form of policy has been established no waiver of its terms can be had except by writing made thereon or attached thereto, also hold that, if at the time of taking out a policy the agent or company knows of the existence of other insurance, the company shall be estopped from avoiding the policy or evading its obligations under it. And yet this same standard form provides "that this entire policy, unless otherwise provided by agreement, endorsed thereon or added thereto, shall be void if the insured *now has* or shall hereafter make or procure any other contract of insurance on the property covered by this insurance." Here is an express stipulation that the policy shall be void if there is

any other insurance existing on the property at the time and an agreement concerning it is not written on the policy itself.

If the standard policy is peremptory and exclusive, why does not it affect the one provision as well as the other? It is to be feared that these courts have inadvertently permitted themselves to indulge to a certain extent in judicial legislation, and have determined to uphold the provision in the one case because it seems reasonable and reject it in the other because it would result in a wrong. In Vance on Insurance will be found a very full reference to these standard policies and their effect upon the rights of the parties, and on the present question the author says: "In fact, while the purpose of the standard form is to insure the making of a contract that shall be fair for both parties, it is primarily intended for the benefit of the insured, and he will not be deprived by the operation of such laws of any rights which he might otherwise have taken under a contract. Therefore, it has been held that the doctrine of waiver and estoppel applies against the insurer and in favor of the insured in the case of contracts in the standard form as well as when the form of the contract is left wholly to the discretion of the parties."

I am of opinion that the Legislature, in providing for a standard form of policy, only intended to forbid the companies from inserting any other stipulations in the contract than those contained in the former, and the statute was not intended to impair or in any way affect the principles and doctrine of waiver and estoppel as recognized and established by the law, as it has heretofore been understood and acted on.

SARAH E. DERMID, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 30 May, 1908.)

1. Railroads—Contributory Negligence—Coupling Cars—Nonsuit.

When as a necessary consequence in coupling together freight cars onto a train the engine must back upon them to take up slack, it is contributory negligence on the part of the conductor to signal the engine for this purpose and then go at once between the cars to couple together the air-brake hose beneath them, when from his experience he knew of the danger of doing so; and upon such evidence by plaintiff a motion of nonsuit should be granted.

2. Same—Safe Methods.

When there is a safe and usual way and an unsafe way to couple cars to a freight train, and a conductor of long experience, having knowledge of the usually safe way, assumes to act therein for the brakeman, whose duty it was, but in the manner known by him to be dangerous, his thus acting will bar a recovery in a suit for damages for injury thereby caused to him.

3. Railroads—Negligence—Modern Equipment—Injury from Another Cause.

When the damages complained of were not caused by failure of a railroad to equip its trains with automatic couplers or the latest and most approved devices, the principles of law enunciated in those instances are not applicable.

4. Railroads—Negligence—Evidence—Coupling Cars.

Evidence of negligence is not sufficient which merely shows that, in obedience to a signal from the conductor, the engineer took up the slack in his train of freight cars and thereby injured the conductor, who, immediately after signalling, went between the cars unexpectedly for the purpose of coupling them.

5. Railroads—Negligence—Evidence—Modern Equipment—"Bumpers"—Questions for Court.

When a recovery against a railroad company is sought upon the ground that its train was furnished and equipped with automatic couplers, but that the bumpers had not been removed therefrom; that plaintiff's intestate was injured while coupling the cars as the engine was taking up slack, the mere fact that the bumpers were permitted to remain on the cars raises no question of negligence for the jury, when it appears from the other testimony that the bumpers were then in general use on cars of that character.

CLARK, C. J., dissenting *arguendo;* HOKE, J., concurring in the dissenting opinion.

DERMID *v.* RAILROAD.

ACTION tried before *Peebles, J.*, and a jury, at March Term, 1908, of BUNCOMBE.

This action is brought by the plaintiff against the defendants, the Southern Railway Company and Dwight W. Newell, a trainmaster of defendant company, for the negligent killing of Claude C. Dermid, a freight conductor in the employ of said company. The court submitted certain issues involving the negligence of the defendants, the contributory negligence of the plaintiff's intestate, and damage.

At the close of plaintiff's testimony the defendants moved to nonsuit, under the Hinsdale Act, and offered no evidence. Upon an intimation of the court that he would charge the jury that, if they found the facts to be as testified to by the plaintiff's witnesses, they should answer the first issue "No," the plaintiff submitted to a nonsuit and appealed.

Merrimon & Merrimon for plaintiff.

Moore & Rollins for defendants.

BROWN, J. We will regard the intimation of his Honor as tantamount to sustaining the motion to nonsuit, and, taking all the evidence in the most favorable light for the plaintiff, we are of opinion that she is not entitled to recover:

1. Because her intestate, upon her own showing, was guilty of such contributory negligence as bars recovery.

2. Because there is no sufficient evidence of negligence.

There were only five witnesses examined—the plaintiff herself, Patton, Moody, Bryant and Barkley. The evidence of the first two throws no light whatever upon the two material issues involved. The evidence of all tends to prove these facts: The plaintiff's intestate was killed on the Balsam Mountain section of defendant company's road, on 16 January, 1906, by being crushed between two cars of a freight train of which he was conductor. In order to get his train up Balsam Mountain the conductor had to take it up in sections. When he had gotten it all up to the top it became necessary

to couple up the entire train again. It was fully equipped with automatic couplers and air brakes. The intestate gave an order to the engineer to detach his engine from the cars and to bring up the caboose and attach it to the end of the train. In order to uncouple, it was necessary to back the engine so that the "slack" would be shortened, thereby loosening the coupling pin holding the coupling of the engine and the car to which it was fastened, so that it could be removed, thus detaching the engine. At the time he gave his order the intestate was standing close by the side of the train and immediately opposite the opening between two parts of the train. He went in between the cars at once, upon giving the order, to couple together the air brake hose under the cars and to turn on the air cock underneath the car couplings. When the engine was backed so as to shorten slack and detach the engine, in obedience to the conductor's order, he was caught between the bumpers of the cars and crushed in the chest and killed. The plaintiff's intestate had been for three or four years a brakeman for the defendant company, and after that had served for about two years as freight conductor. He knew all about the operation of freight trains, and that, to obey the order given to the engineer, the latter must "give slack" to permit the coupling pin to be removed, and that the effect of this must be to push the two cars together. Nevertheless, the intestate at once, upon giving the order, walked between the cars and was crushed. The plaintiff's witnesses themselves characterize such conduct as dangerous. The facts show that the intestate must have seen the bumpers and must have known the effect of "giving slack." The witness Moody testifies to hearing the rumbling noise of the cars as they came back together just before the intestate was hurt. All the witnesses testify that it was the air brakeman's duty to couple the air hose, and that there is a safe and usual method of doing it, which should have been followed by the

intestate. This safe and usual method is testified to very clearly by the witness Moody, a brakeman:

"Question. I wish you would tell how that operation of the making of the coupling of the air hose, the turning of the air cock, should be done in the safest way, under the rules of the company. Do you know?

"Answer. Yes.

"Q. Tell how.

"A. If a man wants to couple the air hose and be safe, he wants to get down and reach under the dead blocks.

"Q. And that is the rule required by the company?

"A. That is the way I always did it.

"Q. And were required to do it?

"A. Yes."

The evidence shows that it was not the conductor's duty to couple air hose, but that of the air brakeman, and it must follow that if he voluntarily undertook to perform that duty he should have done it in the recognized safe method. He had been a brakeman and conductor of long experience and knew how such work was usually done. It was his duty to follow the safe method in general use, and not to walk in between cars that his knowledge and experience told him must soon come together.

The intestate not only chose to unnecessarily encounter an obvious danger, but he selected a method of doing the work known to him to be dangerous, when he could have performed the same act with reasonable safety by following the known method usual among brakemen. That the conduct of the intestate is such negligence as bars recovery for damages sustained in consequence of it is held by the great weight of authority. *Whitson v. Wrenn,* 134 N. C., 86, and cases cited; *Elmore v. Railway,* 132 N. C., 867.

The principle of law applicable here is well stated in *Covington v. Furniture Co.,* 138 N. C., 378, "that where there is a safe and a dangerous method available for the performance

of the work in hand, and the servant selects the latter with actual knowledge of the fact that it is dangerous, he cannot recover." To same effect is *Horne v. Power Co.*, 141 N. C., 50.

The intestate was not killed because the cars were not equipped with automatic couplers or the latest and most approved devices, and therefore there can be no application of the principle enunciated in the *Troxler* and *Greenlee cases*.

We also agree with his Honor that there is no evidence of negligence upon the part of the defendant company, much less upon the part of defendant Newell, the trainmaster.

The engineer was not negligent. He only obeyed the command of the conductor. He was not required to anticipate that the conductor would go outside of his duty and walk into a place of great danger at the very moment the engineer was proceeding to execute his order.

There is no evidence that the cars or any part of them were out of repair in any respect which caused the injury, or that the company's trainmen were either incompetent or insufficient.

The evidence is wholly insufficient to warrant a finding of negligence because the cars had bumpers on them. It is not a question for the jurors as to whether bumpers are useless and should be removed. They are not experts in car construction or railroading. The evidence tends to prove that at the time the intestate was killed bumpers were in general use, especially on all old cars and on railroads generally. There is evidence also that many new cars are constructed with bumpers, but of a new and different pattern and construction.

Why cars should have bumpers on them, and their use and purpose, are not disclosed, but, as is said by Moody, one of plaintiff's witnesses, "I suppose bumpers were considered of use or they would not have been left on." The same witness testified that they are in general use and continue in general use after the adoption of the automatic coupler.

The witness Bryant testified that from 25 to 50 per cent. of freight cars have bumpers on them, that they are visible to a person going between the cars, and that he could not say that in January, 1906, he ever saw a car with bumpers removed.

The witness Barkley, a car inspector, testified:

"Q. To what extent, if you know, have these dead bumpers been in use since the automatic couplers were used?

"A. Not so much. The majority of cars that are being built now are built without them."

Taking the entire evidence offered into review, we think it fails to disclose anything that tends to prove the failure to discharge any duty which either defendant owed to the plaintiff's intestate.

The view we take of the case renders it unnecessary to consider the other exceptions in the record.

Affirmed.

CLARK, C. J., dissenting. The plaintiff's intestate was killed by being crushed by the dead bumpers between two cars while coupling the hose of the air brakes in making up a train of ten cars which had been divided up into sections of three or four cars each and thus carried piecemeal up the Balsam grade and then recombined into a train. The conductor sent word to the engineer to detach his engine and go back and get the caboose, and went in to couple the air hose. The engineer, without warning, backed his engine against these cars to loosen the "slack" so the engine could be detached. The brakes had not been put on by the brakeman, as he should have done, and the impulse given by the engine rolled down the line of cars, so that when the conductor raised up from coupling the hose he was caught between the dead bumpers and killed. The complaint alleges negligence, in that the defendants failed and omitted to discharge their duties, in that they failed and omitted:

1. To provide a safe place to work in, having reference to the deceased's employment as conductor of a freight train.

2. To provide safe appliances and machinery for the accomplishing of the work the deceased was required to do in the operation of his train.

3. To furnish a sufficient number of reasonably safe and competent men or servants to perform their respective duties in the operation of said train.

4. To see that the rules for the conduct of said men and servants were complied with.

The answer of the defendants admits the alleged duties, and only denies that the defendants were guilty of negligence, as alleged.

In the third paragraph the plaintiff alleges her concrete case substantially as follows:

"That in January, 1906, the plaintiff's intestate and the crew were directed by defendants to take charge of a freight train, consisting of engine and tender and five loaded cars and eleven empty freight cars and a caboose, at the city of Asheville, and go west on the road with said train to Addie and distribute said cars at divers stations, and to get together certain loaded freight cars at said last-named station and stations east of it, and form a freight train of the same and bring it to Asheville the same day; that between Addie station and Balsam station, east of it, the said intestate found ten loaded freight cars which he was to take to the city of Asheville; that the grade between the said stations of Addie and Balsam was very steep and heavy and difficult of ascent, and it was necessary to make three trips up said grade to Balsam; that three of said cars were taken up at each of said first trips and placed on a siding, and at the third trip the remaining four cars were taken up and made secure on the main track of the road by the use of brakes; that the engineer then detached his engine from the four cars, went in upon the siding and brought out the six cars on the main track and pushed them back until

they were coupled to the four cars, and then drew out the slack, leaving at the place of the said coupling a wide space between the bumpers of the said two cars, *the said bumpers being unsafe and unfit to be used on the cars, and of a kind and fashion which had been generally discarded as dangerous and unfit;* that as soon as the said coupling was effected and the slack drawn out, the plaintiff's intestate, as it was necessary for him to do, and there being no one else to perform the service, went between the said two cars and bumpers at the point of coupling and turned the angle cock in order to connect the air hose, and while thus engaged the engineer carelessly and negligently and suddenly and *without any warning* to plaintiff's intestate, by the use of the engine, caused the cars in front of the point of coupling to slack back, by means whereof the intestate was caught between the said cars and bumpers and was killed." The complaint further alleges in the said third paragraph: "That, after the cars were coupled and the slack drawn out, the brakeman carelessly and negligently failed and omitted to apply the brakes to the said six cars or any of them in front of the point of coupling to the said four cars, so as to prevent the slacking back and killing of the intestate; that the flagman was not on the train at the time and did nothing to warn plaintiff of the danger; that the negligence of the defendants alleged in this and in the second paragraph of the complaint was the proximate cause of the intestate's death."

The answer admits substantially all the allegations of the third paragraph of the complaint, except the charges of negligence, and sets up the plea of contributory negligence, as follows: "That the plaintiff's intestate contributed, by his own recklessness, carelessness and negligence, to the injuries resulting in his death, in going between the said two cars to turn the angle cock for the purpose of cutting in the air; that it was not his duty to couple and cut in the air, and in attempt-

ing to do so he was acting in direct violation of the known rules and instructions of the company."

At the close of the plaintiff's evidence in chief, the defendants moved for a nonsuit. Upon this motion the court, for some reason unexplained by the argument, denied the motion, but at the same time substantially granted it by announcing that he would charge the jury to answer the first issue in the negative. The plaintiff, upon this intimation, took a nonsuit and appealed.

In the process of the trial the plaintiff took exception to several of his Honor's rulings on questions of evidence, which are unnoticed entirely in the opinion, but which are meritorious.

The plaintiff regarding it as material to show that the dead bumpers which killed the deceased were useless, an obstruction and a dangerous menace, and that if they had been off and out of the way there would have been no danger whatever to the deceased at the time he was killed, her counsel asked the witness: "Suppose that they had been off, what would have been the width of the space between the cars where Dermid was between them when the slack was not drawn out?" Objection was made to this question, and the court sustained it. According to all the evidence it was necessary that whoever coupled the air brakes should go between the cars. It was, then, competent to show that if the bumpers were off the deceased would not have been caught and crushed.

The witness was also asked: "What was the use of the dead bumpers after the automatic couplers were adopted?" This was to show that they were useless, as the other question was to show that they were dangerous and therefore a "defective appliance." It would certainly seem that the plaintiff was entitled to show these facts, and that it was error to exclude these questions.

The witness was an employee on that train when the plain-

tiff's intestate was killed, and saw it all. He was asked: "In reference to the space between the two cars, situated like these where Dermid was killed, suppose there were no bumpers on those cars at all, what would have been the effect of the engine slacking back upon Dermid inside there?" The object was to show that he would not have been hurt, for with automatic couplers, if there were no dead bumpers, there was space enough for safety. The exclusion of this testimony was erroneous. The witness was asked as to a fact in his own knowledge, not an inference.

The witness was asked: "What space would remain between those cars if they had been slacked back without those bumpers on at the time Dermid was killed?" Also, "If those bumpers had not been there, state whether Dermid would have been able to turn those angle cocks and couple the air hose without being crushed between the cars." Both questions were excluded. These questions were asked of a witness who saw the killing of Dermid and knew how it was done. The evidence was competent as tending to prove the allegation that the "bumpers were unsafe and unfit." It was error to refuse to permit the plaintiff to develop her case and prove her allegations. They had not been demurred to. Besides, the allegations were proper and pertinent.

Another witness, Barkley, had testified that he was in the service of the defendant company from the time it took charge of the road, in 1893, down to the latter part of 1896, and then in the latter part of 1901, for a year, as car inspector; that he is familiar with freight cars and their equipment; that, since automatic couplers were used, dead bumpers were not used so much, and that the majority of cars being built now are without them. The witness was then asked, and the question was ruled out: "Is there any difficulty in taking off these bumpers?" It is difficult to see what possible objection there could be to an answer to this question. The answer to it might have been very material, and would have been so

especially if the witness had answered, as he certainly must, that they could have been taken off in a very short time and without trouble or any considerable expense, and that they were of no use whatever since the adoption of automatic couplers. Besides, it is a matter of common knowledge. Any one who looks at a dead bumper can see that there is no difficulty in taking it off.

The last exception presents the single question, Was there any evidence proper to be submitted to the jury tending to prove the affirmative of the first issue, viz., "Was the death of Claude C. Dermid, the intestate of the plaintiff, caused by the negligence of the defendants, as alleged?"

Since *Russell v. Railroad,* 118 N. C., 1098, negligence has been regarded as a question of fact. *Ruffin v. Railroad.* 142 N. C., 120.

In this action the plaintiff alleges various omissions of duty on the part of the defendants constituting negligence, and, if the evidence offered by her tends to establish any one of said negligent omissions as the proximate cause of her intestate's death, the court erred in not submitting this evidence to the jury on the first issue. "Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Fitzgerald v. Railroad,* 141 N. C., 530, cited in *Bird v. Leather Co.,* 143 N. C., 287.

The plaintiff is entitled to have the court look into her case in the most favorable light to her. As was said in *Millhiser v. Leatherwood,* 140 N. C., top of page 235: "All the facts that make for the plaintiffs must be taken as established, and considered by us, and all those that make against them must be rejected. In a few words, they are entitled in this Court to the most favorable interpretation of the evidence, after ex-

cluding all that is against them. * * * The right of the plaintiff to have the case submitted to the jury cannot be denied or abridged, providing there is some evidence tending to establish the plaintiff's contention. The same principle applies with equal force when a plaintiff, in deference to an adverse intimation of the court, submits to a nonsuit."

The evidence tends to show that, under the circumstances and facts as they are admitted by the defendants in their answer, the crew of the freight train in question was not sufficient in number and that the brakeman, Moody, was incompetent or reckless. The witness Bryant had been a freight conductor and a brakeman and knew and understood all about the workings of freight trains, and he testified that it was the duty of the brakeman, Moody, to have charge of the six cars and to use all caution in bringing them out safely from the siding, and that at that particular point he should have put at least one or two brakes upon the rear of the six cars attached to the engine. The witness did not think it would have been necessary to couple the air, as this brakeman was on top and could have fastened the hand brakes, and he should have fastened at least two hand brakes on the rear cars, meaning by rear cars those which were to come in contact with the four cars that had been left on the main track. The witness further said that if the brakes had been applied to the said two rear cars the engine could have been detached without slacking back, and it would seem beyond controversy that the negligent omission of Moody to put on the brakes was the proximate or one of the proximate causes of the death of the deceased. Again, it is alleged that the dead bumpers between the two cars where the deceased met his death were defective. The witness Moody testified that these dead bumpers, when the slack was drawn out, stood from twelve to fourteen inches apart. The witness Bryant said that if these bumpers stood so far apart "it would show a defect somewhere in the draw gear—the gearing fastening the drawhead—and allow one of

the other drawheads to go out too far." The witness Barkley said, upon this point, that if the bumpers were twelve or fourteen inches apart when the slack was drawn out, either they or the draw gear were not in the proper condition. He said their width was about four inches, unless there was a slack in the draw gear from the button or rill pin. This witness was an experienced car inspector.

All the evidence shows that it was common for the freight conductors to go in between the cars and couple the air hose; that this coupling could not be made except by going in between the cars; that it was made under these bumpers. It is almost certain that the deceased stooped and made the coupling, and as he raised himself he came up between these two dead bumpers at the very instant that the cars in front of him were allowed to roll back and catch him. If these dead bumpers had been only four inches apart he could not have been caught between them. He was a large man. And, again, if the bumpers had not been on, there would have been ample room between the cars for the deceased to stand without being injured. Besides, the deceased had a right to rely upon Moody, the brakeman, to do his duty. Moody in this respect represented the company. *Fitzgerald v. Railroad,* 141 N. C., 534. In that case it is held that the "Fellow Servant Act," where it applies, "has the effect of making all employees of the railroad companies agents and vice-principals of the company, so far as fixing the company with responsibility for their negligence is concerned, * * * and it operates on all employees of the company, whether in superior, equal or subordinate positions."

The evidence in this case tends to show gross negligence on the part of the brakeman. According to his own testimony, when he went to bring out the six cars from a siding he took off the brakes. The air hose was not coupled, and when he got on the main track, although the six loaded cars had to be moved down grade to be coupled, he did not apply the hand

brakes to any car of the six, but quietly descended from the cars and did nothing. He certainly did not give the deceased warning in any way that he was neglecting his duty.

Now, as to the defendant Newell, the trainmaster. He was charged with the duty of furnishing to the deceased a safe place to work. It was his duty to see that he did not give deceased freight cars with defective dead bumpers, and that he did not give him negligent or incompetent brakemen, and that he did give a sufficient number of men to manage the train in a safe manner. The conductor was forced to couple the air hose, though not a conductor's duty, because the only other employees were the engineer, fireman and brakeman, who were otherwise employed. It also seems, from the testimony of Moody, that the deceased had no rules or instructions, from Newell or any one else, to go by, but acted upon his own initiative and made his own rules. There is also sufficient evidence tending to show that the engineer was negligent in slacking back the train, as he did, without warning any one. Indeed, there is not any negligence charged in the complaint that is without evidence to support it, and the evidence was such as ought to have been submitted to the jury. The company and its trainmaster, Newell, were both guilty of continuing negligence, as the same has been defined in the leading cases of *Greenlee v. Railroad,* 122 N. C., 977; *Troxler v. Railroad,* 124 N. C., 191; *Elmore v. Railroad,* 130 N. C., 506, and 132 N. C., 865; *Fleming v. Railroad,* 131 N. C., 481; *Hairston v. Leather Co.,* 143 N. C., 512.

Dead bumpers were always dangerous, but with the old link and pin they were necessary to keep the cars from smashing into one another. After the adoption of automatic couplers dead bumpers were *unnecessary and dangerous;* hence their retention is a defective appliance and a continuing negligence. They are dangerous, because a witness on this trial testified to it, and on this motion his evidence must be taken as true. Besides, the killing of plaintiff's intestate also

proves it. They are unnecessary, because the witnesses testified that all the new cars built by the defendant since automatic couplers were adopted were without dead bumpers, and that they had been removed from all its old cars whenever "shopped," *i. e.*, sent to the shops for any purpose. The witnesses refused pointedly to testify that these dead bumpers were "in general use" at the time of Dermid's being killed by them, and even to say that they were then "extensively used." All that they would say was that they were "used some." One witness thought that 25 per cent. of the old cars of the "Southern" still had these bumpers; another said it might be 40 to 50 per cent. of their old cars had them. It may be added here that, by actual count, in the last few days only 2 per cent. of the freight cars coming into Raleigh on all the railroads still had "dead bumpers."

In 1892 (fifteen years ago), in *Mason v. Railroad*, 111 N. C., 482, the Court intimated that the absence of automatic couplers might be held negligence, and did so hold in *Greenlee v. Railroad*, 122 N. C., 977, as to an accident which occurred in 1896. Congress in 1893 passed the act requiring automatic couplers to be put on all freight as well as passenger cars by 1 January, 1898. The danger of being caught and crushed by the dead bumpers was the chief danger removed by the adoption of automatic couplers, for until that was done they were necessary. After that they were unnecessary, as is fully shown by the evidence that none of the defendant's cars built since the adoption of automatic couplers have these dead bumpers, and that they have been removed from the old cars at its convenience, *i. e.*, whenever "shopped." As the absence of automatic couplers in 1896 was declared negligence, certainly the retention of the dangerous bumpers at the time of this accident, in 1906, ten years after they had become unnecessary, was negligence *per se*, or at least evidence of negligence which should have taken the case to the jury.

It is quite certain that his Honor's ruling was based, not so much upon the want of evidence of the defendant's negligence, but upon what he regarded as the negligence of the deceased in going between the cars. Presumably the plaintiff's intestate exercised due care for his own safety. *Cogdell v. Railroad,* 132 N. C., 852, cited in *Stewart v. Railroad,* 141 N. C., near top of page 277.

This presumption is founded on a law of nature, the instinct of self-preservation. *Railroad v. Landrigan,* 191 U. S., top of page 474; *Railroad v. Gentry,* 163 U. S., 366, and cases there cited.

There is never any presumption of contributory negligence. *Norton v. Railroad,* 122 N. C., foot of page 928. But the Judge, indeed, had nothing to do with the question of contributory negligence. The act of the deceased in going between the cars stands upon the same footing as the act of the engineer who caught a grab-iron to get on an engine; whether it was negligence to do so or not was a question for the jury. *Coley v. Railroad,* 128 N. C., 534; *Walker v. Railroad,* 135 N. C., 741.

As was said in *Railroad v. McDonald,* 152 U. S., foot of page 281, "Even in the case of an employee of a railroad company claiming to have been injured as a result of the company's negligence, this Court has said that, in determining whether he has recklessly exposed himself to peril or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had for the exigencies of his position—indeed, to all the circumstances of that particular occasion." See, also, *Kane v. Railroad,* 128 U. S., 91, where it is held that "This question ought not to be withheld from the jury unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively establishes contributory negligence that the court would be compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor."

See, also, *Railroad v. Cox,* 145 U. S., at page 606. The defendant company was bound to take notice of the unfitness of the dead bumpers on those cars. *Warner v. Railroad,* 94 N. C., 250.

The dead bumpers, by the evidence in this case, were dangerous and unnecessary, hence a defective appliance; and by the "Fellow Servant Act" the plaintiff's intestate assumed no risk therefrom. Revisal, sec. 2646; *Coley v. Railroad,* 128 N. C., 534; *same case,* 129 N. C., 407.

The contributory negligence pleaded was not that the deceased failed to act prudently after going between the cars, but only that his death was caused "by his own recklessness, carelessness and negligence in going between the cars to turn the angle cock for the purpose of cutting in the air, which was not his duty, and in doing what he did he was acting in direct violation of the known rules and instructions of the company." Now, clearly, there was no negligence in going between the cars. The air hose had to be coupled, and this could not be done without going between the cars, and the conductor was responsible for his train and the proper management of it and was in the habit of connecting the air hose. There is not a syllable of evidence to show that he was acting in violation of any rule or of any instructions of the company or any one else. It is not contributory negligence to undertake a dangerous work. *Thomas v. Railroad,* 129 N. C., 392; *Cogdell v. Railroad,* 129 N. C., 400.

The deceased was ordered to go and bring in the loaded cars, and it was the duty of the company to see that those cars were safe in all respects. *Railroad v. Tynon,* 56 C. C. A., 192; 119 Fed., 288.

The deceased was entitled to assume that his employer had used due care to provide reasonably safe appliances for doing his work (*Railroad v. Swearingen,* 196 U. S., 51; *Railroad v. McDade,* 191 U. S., 64-68), and also to see that competent and safe men were employed. *Railroad v. Patterson,* 162

U. S., 353, middle of page. A case very like the one at bar is *Moore v. Railroad,* 67 C. C. A., 541; 135 Fed., 67.

Where an injury is done which in the ordinary course of things ought not to happen, there is a presumption of negligence. *Fitzgerald v. Railroad,* 141 N. C., 539, 540; *Wallace v. Railroad,* 141 N. C., 664; *Ellis v. Railroad,* 24 N. C., 138.

Whether the deceased was working in the line of his duty when killed was a question for the jury. 2 LaBatt M. & S., sec. 634.

What is a reasonably safe place to work in is for the jury. *Dorsett v. Manufacturing Co.,* 131 N. C., 254. It is for the jury to say whether the train was handled with due care (*Railroad v. Rymer,* 189 U. S., 468), and as to what would have been a sufficient train crew. *Stewart v. Railroad,* 141 N. C., 253; 1 LaBatt M. & S., secs. 204, 205.

As was said in *Biles v. Railroad,* 143 N. C., foot of page 81, it will be noted that no carelessness is charged against the deceased in his personal conduct except that of going between the cars to couple the air hose, and that in going between the cars he assumed the risk. Servants never assume risks occasioned by the master's negligence. *Railroad v. Archibald,* 107 U. S., 665; *Railroad v. McDaniels,* 107 U. S., 454. Besides, as said in *Biles v. Railroad, supra,* the defense of assumption of risk has been eliminated in cases like the one at bar. The right of action is given by the statute in such cases. Also, *Hudson v. Railroad,* 142 N. C., 198; *Walker v. Railroad,* 135 N. C., 741.

"A case should not be withdrawn from a jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." *Gardiner v. Railroad,* 150 U. S., 360, top of page 361, citing *Railroad v. Ives,* 144 U. S., 408, and *Railroad v. Cox,* 145 U. S., 593, 606. The clear and forcible brief of plaintiff's counsel has been used much in preparing this dissent.

Congress and the State Legislature have passed statutes like the fellow-servant law and others to protect employees of railroads from exposure to unnecessary risks and to diminish the percentage of casualties in that service, which is vastly greater than on European railroads, and therefore, presumably at least, avoidable to some extent. But such statutes are in vain unless there is a thorough investigation by courts and juries of charges of negligence. As to automatic couplers and the block system, we have sustained the right of these men to safe appliances. The dead bumpers were the most serious danger, whose removal was made possible by the adoption of self-couplers. In *Kyles v. Railroad,* 147 N. C., 394, the concurring opinion spoke highly of the fidelity of these men. But they are entitled to more than words of praise. They are entitled to the removal of antiquated and dangerous devices and to compensation for injuries caused by failure to do so.

W. P. BLACK ET AL. v. THE NORTH RIVER INSURANCE COMPANY.

(Filed 30 May, 1908.)

For digest, see *Black v. Insurance Co., ante,* 169.

ACTION tried before *Peebles, J.,* and a jury, at March Term, 1908, of BUNCOMBE.

Zebulon Weaver and *H. B. Carter* for plaintiffs.
Tillett & Guthrie for defendant.

CONNOR, J. The facts in respect to the form of the policy and conditions therein are the same as in *Black v. Atlantic Home Insurance Co.* Additional insurance was taken by the plaintiff on the property. No consent thereto was endorsed on the policy, nor was any waiver by the agent endorsed

thereon. Parol evidence was offered to show waiver by the agent. His Honor held, as in the other case, that it could be shown only in the manner prescribed by the policy. Plaintiffs excepted. The decision upon the exception to his Honor's instruction to the jury in regard to the waiver renders any discussion of the other exceptions unnecessary. For the reason set out in the opinion of *Black v. Atlantic Home Insurance Co.* the judgment must be

Affirmed.

MRS. CLARA M. FEATHERSTON v. JAMES H. MERRIMON ET AL.*

(Filed 30 May, 1908.)

1. Deeds and Conveyances—Construction—Entirety—Intent.

In construing a deed the court will examine the entire instrument and construe it as a whole, consistent with reason and common sense, to effectuate the intention of the parties.

2. Deeds and Conveyances—Descriptive Words—Reservation—"Retain."

When in a deed describing by boundaries the land therein conveyed the words, "including a lot given to S. C. W., which is still retained," are used, the clear meaning of the word "retain" excludes the conveyance of that part of the lands, and title passes only to the land within the larger boundaries, exclusive thereof.

3. Deeds and Conveyances—Property of Another—Intent—Presumptions.

In the construction of a deed the presumption is that the grantor does not intend to convey property of another contained within the description of the land conveyed. Such intent must clearly appear.

4. Deeds and Conveyances—Trusts and Trustees—Parties—Estoppel.

A deed made by one assuming to act as trustee for the benefit of his grantor's wife and children, under a deed in trust not executed by the wife, does not by its recitals estop the wife, when not a party thereto, from claiming title to her land embraced therein.

*HOKE, J., did not sit upon the hearing of this case.

5. Deeds and Conveyances — Trusts and Trustees — Husband and Wife—Tenant by the Curtesy—Wife's Land—Deed of Husband—Intent Presumed—Wife's Estoppel.

A trustee for the wife, under a deed from the husband which was not executed by the wife, conveyed certain lands to N. upon the same uses and trusts. The husband and wife separated during the year in which the deed was made. The land conveyed was by given boundaries, but the description contained these words: "including the lot given to the wife by her father (which is still retained by her)." The husband had an interest in his wife's land as tenant by the curtesy. The wife was not a party to the deed: *Held*, (1) if it be conceded that the lot spoken of as "retained" by the wife passed by the description, the law will presume that only such interest as the husband had therein was, or was intended by him to be, conveyed; (2) as to the wife, there was no estoppel created so as to pass her estate.

6. Deeds and Conveyances — Descriptive Words — Husband and Wife—Trusts and Trustees—Judgment, Construction of—Estoppel—Injunction.

In an action to remove a trustee created under the husband's deed of trust for the benefit of the wife and children it was established by the verdict of the jury, upon the issues submitted, that certain lands of the wife embraced in the boundaries of the said deed were not by the use of the language "including," etc. "(which is still retained)," included in the conveyance. Judgment was rendered reciting the issues and verdict thereon, using the same descriptive words of the land as used in the trust deed. The present action is by the child to enjoin the sale, under a subsequent mortgage, of the wife's land thus excluded in the former judgment from the operation of the trust deed: *Held*, that, construing the former judgment as an entirety, (1) it was not intended by the court to divest the wife of her title to the land by reason of the use in the judgment of the description contained in the trust deed; (2) the use of the descriptive language by the court, under the circumstances, adopting the description contained in the trust deed, evidenced his opinion that the wife's land was excluded; (3) the plaintiff in this action is estopped by the former judgment to claim any interest in the land mortgaged by the wife; (4) a restraining order upon these facts should be dismissed.

ACTION heard by *Guion, J.*, at September Term, 1907, of BUNCOMBE.

This is an action to enjoin the defendants from selling, under a deed of trust from Samantha C. Wilson to J. G. Mer-

rimon, executed to secure a debt of $500 to J. H. Merrimon, a parcel of land in the city of Asheville, fronting on Main Street and particularly described in a deed from James W. Patton to Tenison Cheshire, and by the latter conveyed to his daughter, Samantha Cheshire, who married John W. Wilson in 1851. Wilson and his wife separated, it appears, about 1861. The plaintiff is the surviving child of that marriage. On 16 April, 1861, J. M. Israel, who professed to act as trustee of said Samantha C. Wilson and her children, under a deed from John W. Wilson to him for their use and benefit, conveyed a certain lot in Asheville, the boundaries of which the plaintiff claims include the property now in controversy between the parties, but the description is in the following words: "Also one lot on Main Street in Asheville, bounded on the east by said street, north and west by the lot of said J. W. Wilson, and south by the lot of J. B. Meares, including the lot given to said Samantha C. Wilson by her father (which is still retained by her), said lot hereby granted, said lot being 31⅛ feet front by 90 feet deep, to a line with the oak tree on the back of said lot, parallel to the street, being part of a lot conveyed by J. B. Sawyer, C. M. E., at the sale of the Coch lands." The deed of J. M. Israel merely purports to convey the legal title, which he claimed to have, to George W. Neely, to be held by the latter upon the same uses and trusts and in the same manner as he held it.

On 25 November, 1892, an action was brought by John W. Wilson and his daughter, Clara M. Featherston, who is the plaintiff in this action, against Samantha C. Wilson, George W. Neely, trustee, and J. M. Israel, for the purpose of having George W. Neely removed as trustee and another trustee appointed, for an account of his trust and for any amount found to be due Clara M. Featherston, and that she be declared the equitable owner in fee of the land described in the deed from J. M. Israel to George W. Neely, with the present right to two-thirds of the rents and profits of the said realty. The

deed of J. M. Israel to George W. Neely is annexed to the complaint in that action as an exhibit. The defendants answered, denying the material allegations of the complaint. John W. Wilson died during the pendency of that action.

The issues raised by the pleadings were submitted to a jury, which, with the answers thereto, are as follows:

1. "Has the trustee, George W. Neely, wrongfully failed to perform the duties of trustee imposed upon him by the deed of trust?" Answer: "Yes."

2. "Was the property sued for purchased and paid for with the separate property of the defendant?" Answer: "No."

3. "Were the four acres contained in said deed, situated on College Street, bought and paid for with the money of the defendant and with the understanding and agreement that the same should belong to the defendant and be her separate property?" Answer: "No."

4. "Is the plaintiff tenant in common with the defendant in the land set out and described in the complaint and deed of trust, and to what interest in said property is plaintiff entitled?" Answer: "Yes; two undivided thirds in fee, and remainder in the other third, after the death of S. C. Wilson, in the lot on College Street, and in the one on Main Street, except that portion on Main Street which the father of the defendant S. C. Wilson conveyed to her."

5. "Does the defendant Samantha C. Wilson wrongfully retain possession of said land?" Answer: "Yes, as to two-thirds."

It was therefore adjudged by the court, at March Term, 1898, his Honor, *Judge W. A. Hoke*, presiding, as follows: "That the plaintiff, Clara M. Featherston, is seized and entitled to the possession of two-thirds and the defendant Samantha C. Wilson of the remaining one-third of the trust estate created by the deed of trust of 16 April, 1861, as tenants in common during the life of the said Samantha C. Wilson, with the remainder in fee simple to the plaintiff, Clara M. Feather-

ston, at the death of the said defendant Samantha C. Wilson, and that the said plaintiff, Clara M. Featherston, is entitled to have and recover two-thirds and the defendant, Samantha C. Wilson, one-third of the rents and profits now accruing or that may hereafter accrue from or out of the lands described in said deed of trust, which is as follows: The lot in the town of Asheville on which said Samantha C. Wilson now lives, containing four acres, more or less, on College Street, on the corner opposite the grounds of the H. C. F. College, formerly conveyed by James W. Patton to said J. W. Wilson, and by Wilson to J. M. Israel in trust, for a more full description of which said deed is referred to; also one lot on Main Street in Asheville, bounded on the east by said street, north and west by the lot of said J. W. Wilson, and south by the lot of J. B. Meares, including the lot given to Samantha C. Wilson by her father (which is still retained by her), and fully described in the deed of Tenison Cheshire, registered in Book 25, page 101, of the Register's office of Buncombe County, said lot is hereby granted, being 31⅛ feet front by 90 feet deep, to a line with the oak tree on the back of said lot, parallel to the street, being part of a lot conveyed by J. B. Sawyer, C. M. E., at the sale of the Coch lands, during the life of the said Samantha C. Wilson, and at her death the plaintiff, Clara M. Featherston, shall have and receive the rents and profits accruing thereon, forever and in fee simple, as provided in the said deed of trust." It was further adjudged that George W. Neely be removed from his office as trustee, with directions as to the administration of his trust. The defendant in that action, Samantha C. Wilson, was adjudged to pay the costs. The defendant Samantha C. Wilson excepted and appealed, and at September Term, 1898, of this Court the judgment was affirmed (123 N. C., 623).

In this action his Honor, *Judge O. H. Guion,* at October Term, 1907, continued the injunction to the final hearing, and the defendants J. H. and J. G. Merrimon duly excepted and appealed.

Merrick & Barnard for plaintiff.

Merrimon & Merrimon, Thomas Settle and *G. S. Reynolds* for defendants.

WALKER, J., after stating the facts: The decision of this case may well depend upon what is the true construction of the deed of J. M. Israel to George W. Neely, dated 16 April, 1861, and the verdict and the judgment of the court in the case of *Featherston v. Wilson and others,* which was rendered at March Term, 1898, of the Superior Court of Buncombe County. Samantha C. Wilson executed a deed to J. G. Merrimon, as trustee, to secure a debt of $500 due to James H. Merrimon for money borrowed, the land conveyed by that deed being the lot which she got from her father, Tenison Cheshire, who himself had acquired it from James W. Patton by deed dated 10 February, 1853, and it is the same lot which is mentioned in the deed of J. M. Israel to George W. Neely as having been retained by her. If that lot was not conveyed by the deed of Israel to Neely, then the Judge erred in continuing the injunction to the hearing, as in that event the defendant has a right to sell the same under the power of sale contained in the deed of trust to him, provided, also, he and his codefendant are not concluded or estopped by the judgment and proceedings in the suit of *Featherston v. Wilson.* We do not think the lot described in the deed of trust to the defendant J. G. Merrimon was conveyed or intended to be conveyed by Israel in his deed to Neely. The expression in that deed, "including the lot given to the said Samantha C. Wilson by her father," when considered in connection with the words in parentheses which immediately follow, namely, "which is still retained by her," shows very clearly that the words first quoted were merely used as descriptive of the larger boundary and not for the purpose of embracing the smaller lot within the terms of the grant, so that it would also pass by the deed. The words "which is still retained by her"

were evidently inserted in the deed with the intention of excepting the smaller lot from the conveyance. If not, why use those words at all? What other meaning can we ascribe to them than the one which we have adopted? And yet we know that they were intended to have some weight and significance in determining what the parties intended to convey. Deeds, like most other instruments, should be construed for the purpose of ascertaining the true intent of the parties, and we should look at the whole instrument, taking it by its four corners, as is said sometimes, and learn its meaning. The intention of the parties should always prevail, if agreeable to the rules of law. *Goodlittle v. Whitly,* 1 Burrows, 233, per *Lord Mansfield.* In *Gudger v. White,* 141 N. C., 507, we held that courts are required to interpret or construe a deed, as the case may require, to find out and effectuate the intention of the parties as gathered from the entire instrument, and it is proper to look for a rational purpose in the language and provisions of the deed, and to construe it consistently with reason and common sense. "To retain" means to hold or keep that which one already owns, "not to lose, part with or dismiss it." Webster Int. Dict. (1900), p. 1229; *Kenyon v. Saunders,* 18 R. I., 590 (30 Atl. Rep., 471). It more definitely means to "keep back" that which one then owns, for he cannot retain that to which he has no right or title. *Cudworth v. Bostwick,* 69 N. H., 536 (45 Atl. Rep., 409); 7 Words and Phrases (1905), p. 6196. So, we see, thus far, that J. M. Israel did not intend to convey the property of Mrs. Wilson, to which he had no title, so far as appears. We are not warranted in presuming that a man will do the injustice of conveying another's land and casting a cloud upon his title. The intent to do so must be clear, for the law never presumes a wrong.

There is one case in our own reports which seems to justify our construction of this deed. In *Wells v. King,* 94 N. C., 344, the deed contained a description of the general bounda-

ries by courses and distances, and there followed these words: "including all lands not heretofore sold." This Court said: "These lands were as much excluded from the operation of the deed to Wells as if they had not been embraced within the sweeping boundary of that deed. It not only did not profess to include them, but expressly excluded them from its operation whenever it might be ascertained that they fell within the exception." In *Brown v. Rickard,* 107 N. C., at page 645, the Court says: "It is insisted, however, for the appellants that the boundary referred to in these conveyances is that particularly specified in the older grant, and that this embraces the exception therein, designated in the pleadings as the 'Stevely land,' and, therefore, this land is embraced by the description, 'all the land remaining unsold and contained within that boundary.' But what was that boundary, as intended and made by the grant? It did not consist necessarily and merely of the external metes and bounds of the grant; it embraced as well its internal metes, bounds and limits, and hence it embraced also the location, the metes and bounds of the land excepted from the grant—the 'Stevely land.' It had such internal boundary. The grant referred to the excepted land, its metes and bounds, and these became a part of its own boundary, as much so as if the same had been specifically set forth in the grant itself. Hence 'all the land remaining unsold and contained within the boundary of,' etc., implies the boundary including that which excludes the exception, that embraced the 'Stevely land.' Such is the meaning of the terms and phraseology employed in the conveyances referred to, and such was the clear intent of the parties to the same." We do not attach any significance or importance to the words "said lot hereby granted, said lot being 31⅛ feet front by 90 feet deep," which immediately follow the words in parentheses, namely, "which is still retained by her." The words "said lot hereby granted" were evidently inserted thoughtlessly and not intended to have any special bearing

upon the description, and certainly not to broaden its scope. The parties adopted rather a clumsy way of describing the land by giving the outside boundaries and excepting therefrom Mrs. Wilson's land, using an inapt word, "including," which, while not very appropriate to define the real boundaries, does not reverse the meaning which the parties intended to express, though it may have thrown some obscurity upon the description. But, taking all the words into consideration, we think the meaning is clearly indicated.

We do not see in this record any sufficient evidence that J. W. Wilson ever conveyed the fee in this land to J. L. Henry or to J. M. Israel as trustee. There are some recitals in the deed of Israel to Neely which point that way, but Mrs. Wilson was not a party to the deed and is not estopped by its recitals. If we may resort to mere conjecture, it may be inferred that at some time Wilson did convey to Henry. The latter signed the deed of Israel to Neely, and so did Wilson, but their names appear nowhere in the deed as grantors; and if this be sufficient to take the legal title out of Wilson and to vest it successively in Henry and Israel, which may admit of some doubt (*Adams v. Hedgepeth,* 50 N. C., 329; *Kerns v. Peel,* 49 N. C., 226, and especially *Gray v. Mathis,* 52 N. C., 502; *King v. Rhew,* 108 N. C., 698), we yet think that, as Wilson was tenant by the curtesy initiate of the land, he having had issue born alive capable of inheriting, and the separation alone not having the effect of divorcing the parties (*Wilkes v. Allen,* 131 N. C., 279), it must be assumed in law that he intended to convey only his own estate and interest in the lot; and surely it would not create any estoppel as to her, and thereby pass his wife's estate, as an estoppel does not arise where an interest passes by the deed, and the husband in this case had such an interest, which expired with his death, during the pendency of the former action. It is not controverted, we believe, that Mrs. Wilson acquired title to the lot in controversy from her father, Tenison Cheshire,

and that she mortgaged it to Judge Merrimon. We discover nothing in this case to show that she has *ever* parted with her title, except in the manner just mentioned. We have so far, of course, discussed the case upon the assumption that the deed of Israel to Neely was sufficient in form and in the mode of its execution to divest Wilson of the legal title and to estop Mrs. Wilson, neither of which propositions can successfully be maintained, as we think.

But when we examine the record of the former suit between the plaintiff, Clara M. Featherston, and Mrs. Wilson, we think a conclusive case is presented for the defendants. It will be readily seen that, by any kind of permissible construction of the verdict and judgment in that case, the court intended to exclude the lot now in controversy from the operation of its decree and to declare and adjudge, at least by the clearest implication, the legal and equitable title to be in Mrs. Wilson. There were two lots described in the Israel deed and in that suit—one on College Street and the other on Main Street. The latter is the one now in dispute. The verdict, by express words, the meaning of which cannot well be misunderstood, excludes the Main Street lot. The issue and verdict are as follows: "Is plaintiff tenant in common with the defendant in the land set out and described in the complaint and deed of trust, and to what interest in said property is the plaintiff entitled?" Answer: "Yes; two undivided thirds in fee and the remainder in the other third after the death of S. C. Wilson in the lot on College Street and in the one on Main Street, which she acquired (presumably) by gift from her father, Tenison Cheshire." And they also find that at that time she still owned it, and it is accordingly excepted from the description of the land of which they declare the parties to be tenants in common. It is not to be presumed that the learned counsel who appeared for Mrs. Wilson and the learned and accurate Judge who presided at the trial, distinguished for his carefulness in the trial of causes and his

correct perception of the matters involved therein, would enter a judgment inconsistent with the verdict and which would deprive Mrs. Wilson of the benefit which she derived from the decision of the jury in her favor. But we do not think the judgment was so drawn. It recites the verdict of the jury, and thereby clearly indicates what its scope and effect were intended to be. It is true, in a subsequent part of the judgment the same language is used as we find in the deed of Israel to Neely, but this only goes to show what idea the learned Judge thought that language was intended to convey, namely, that the lot which Mrs. Wilson acquired from her father was not to be considered as a part of the lands held in common by the parties, but was excepted from the operation of the deed. We must construe the case as an entirety and not disjointedly, and, when so considered, we do not hesitate to conclude that it was not in the contemplation of the court to divest Mrs. Wilson of her title to the lot which is described in the deed of trust to J. G. Merrimon. The suggestion that Mrs. Wilson never claimed more than a life estate cannot change the result in the least, if it is well founded. It related, of course, to the land outside the boundaries of the Tenison Cheshire lot. We must hold, upon a fair construction of the record in *Featherston v. Wilson,* that the plaintiff is estopped thereby now to claim the lot conveyed to J. G. Merrimon, instead of the defendants being concluded by that record under the doctrine of *lis pendens.* The general result is that his Honor erred in continuing the injunction to the hearing. It should have been refused and the defendant J. G. Merrimon permitted to sell under the power of sale contained in the deed of trust. The court, perhaps, might have ordered that the plaintiff, if she has an interest in the property as heir of her mother, should have reasonable time to redeem the land. But with this matter we have nothing to do now.

We have not discussed the doctrine of *lis pendens* or that of election, so ably and learnedly presented in the briefs of counsel, as we do not deem it necessary to do so, in the view we take of the case. The doctrine of *lis pendens* and the equitable principle of election are clearly excluded by our construction of the deed. We are of the opinion, and so decide, that the plaintiff has stated no cause of action against the defendants in her complaint, and the action should therefore be dismissed.

The judgment should be reversed, and it is so ordered.

Reversed.

GEORGE W. SMITH v. HOLMES BROS.

(Filed 25 May, 1908.)

1. **Appeal and Error—Excusable Neglect—Facts Found.**

   The trial Judge should find the facts involved on appeal from his order setting aside, in his discretion, for excusable mistake or neglect, a judgment previously rendered.

2. **Appeal and Error—Excusable Neglect—Legal Excuse Appearing in Record.**

   When neither party to an appeal from an order of the trial Judge setting aside on reasonable terms a judgment previously rendered, on the ground of excusable mistake or neglect, has requested the Judge to find the facts, and it appears from the statement made of record by the Judge, and from other statements therein, that the case was tried in the absence of counsel, who had good cause to believe that the case would not be then taken up under the existing circumstances, the appeal will be affirmed.

ACTION heard by *Cooke, J.*, at Fall Term, 1908, of JACKSON.

This is an appeal from an order of his Honor, *Judge Guion*, setting aside a judgment of nonsuit rendered at a former term of the court. The ground of the application was that the absence of plaintiff's counsel was caused by excusable mistake. A number of affidavits and a "statement" by *Judge*

O. H. Allen, who rendered the judgment of nonsuit, were submitted to his Honor. The order setting aside the judgment of nonsuit taxed the plaintiff with the entire cost accrued to the time of the judgment, together with certain traveling expenses and hotel bills incurred by defendant. His Honor did not find the facts, but rested his order upon the exercise of his discretion. Neither party requested him to find the facts. Defendant excepted, assigned error and appealed.

Davidson, Bourne & Parker and *Busbee & Busbee* for plaintiff.

C. C. Cowan for defendant.

CONNOR, J. It is settled by a number of decisions of this Court that, upon a motion to set aside a judgment for excusable mistake or neglect, the Judge should find the facts. The reason for this requirement has been set out and need not be repeated. *Marsh v. Griffin* and other cases cited in Clark's Code (3d Ed.), pp. 310, 311. It is usual in cases which come to us in the condition presented by this record to remand the case for the purpose of having the facts found. We have examined the record with care and find no controversy in regard to the material facts. They appear very largely from the statement of *Judge Allen* used on the hearing. It seems that the case was pending in Jackson Superior Court, and Mr. Bourne, of the firm of Davidson, Bourne & Parker, of Asheville, had charge. Mr. Cowan and Hon. W. E. Moore appeared for defendant. Some correspondence had taken place between Mr. Bourne and Mr. Cowan relative to the trial of the case. At the May Term, 1907, which, by law, could, if the business so required, continue two weeks, Mr. Bourne had an important engagement at Murphy during the first week, and had requested Mr. Cowan to consent to a continuance, which he had declined. The case was set on the calendar for 23 May of the first week, of which Mr. Bourne was notified. *Judge Allen* makes the following statement: "The

facts stated by Mr. Bourne in his letter to me as to having explained to me that he had to be at Murphy the first week of Webster court, and requesting that the case be set for the second week, are true, and I conferred with counsel on the opposite side, and my recollection is that it was understood that it would not be tried until the second week unless Mr. Bourne came from Murphy, but during the first week it soon became evident that court would adjourn during the first week, and I therefore requested Mr. Cowan, who was urging a trial, to write Mr. Bourne at Murphy that the case would be called for trial during the first week, and he informed me he had done so." After stating the circumstances attending the signing of the judgment, *Judge Allen* says: "If I had known that Mr. Bourne had not gotten the letter notifying him that court was about to adjourn, I should have continued the case or held the court open till the next week and tried it. He had good cause to believe that the case would not be taken up in his absence and without notice to him." Mr. Cowan wrote the letter, and a second letter, but for some reason Mr. Bourne did not receive them. He was at Murphy, engaged in the trial of another case. It seems that Mr. Styles, an attorney, had been requested by Mr. Bourne to notify him of the conditions existing at Webster. Mr. Styles had a conversation with *Judge Allen* on Saturday, as he thought, in regard to this case, but, as *Judge Allen* thought, in regard to another case in which Mr. Styles was concerned. He said to Mr. Styles that the case had been continued, and Mr. Styles immediately so telegraphed Mr. Bourne, who had returned to Asheville, and, with his client's agent, was preparing to try the case the next week at Webster, when he received the telegram from Mr. Styles. In regard to this conversation *Judge Allen* says: "I am sorry I misunderstood Styles. My recollection is that he had a case in his own name on the docket and that it was continued. I thought that he was speaking about that case and you (Mr. Bourne)

were his attorney." He also says that, while the matter was being discussed, some gentleman of the bar, not Mr. Cowan, stated that he thought plaintiff intended to "abandon his action." No blame is attached to any one in this connection. There is no question about the fact that Mr. Cowan wrote and mailed the letter to Mr. Bourne, nor is it denied that he failed to receive it. Mr. Cowan never agreed that the case should go over until the second week. These facts, which are all material to the decision of the case, are not controverted. It would only cause delay and expense to all parties to have the case remanded to find them. They present a "chapter of accidents" and a combination of misunderstandings. No possible blame can be attached to the action of any one concerned. Taking *Judge Allen's* statement, not controverted by any one, we think with him that, in view of what he understood, Mr. Bourne "had good cause to believe that the case would not be taken up in his absence without notice to him." There was no purpose on his part or that of his client to delay a trial. Every act on his part evinces a purpose and expectation to try the case during the second week of the term, and this, *Judge Allen* says, he understood would be done. We do not perceive any substantial difference between section 513 of Revisal and the statute as found in The Code of 1883, sec. 274; certainly none affecting this motion. Upon a careful examination of the entire record, we think that the absence of counsel was caused by excusable mistake, and that his Honor correctly set aside the judgment, imposing reasonable terms. The judgment is

Affirmed.

J. M. BRADBURN ET AL. V. G. ROBERTS.

(Filed 25 May, 1908.)

1. Appeal and Error—Procedure—No Substantial Right Affected.

When in the proceedings appealed from there was a slight technical deviation from the usual procedure in like cases, but there was no substantial irregularity therein or prejudice to appellant's rights, he cannot be heard to complain on that account.

2. Deeds and Conveyances—Trusts and Trustees—Foreclosure Proceedings—Failure to Redeem—Equitable Remedies.

Under a consent decree it was admitted that the vendee held the land in controversy in trust to pay an obligation to him of the vendor in a specified sum, and adjudged that the vendor have the amount of the rents and profits credited thereon, ascertained by a reference to be in a certain sum. The court thereupon adjudged that the land be sold by a commissioner, authorizing him to make title, and who, in pursuance thereof, made title to the said vendee: *Held*, (1) that the vendor was estopped from contending for a recovery as to new credits set up for waste, except such as were not conclusively settled by the judgment; (2) that by the consent decree the action virtually became one to foreclose a mortgage; (3) that there was no error in the order of the trial Judge that the land be sold and the equities administered upon the failure of the vendor to redeem within the time specified in the decree.

3. Pleadings—Relief Demanded—Relief Granted.

Parties to an action are not confined to the specific relief demanded in their prayers therefor, under our Code practice, and the court will give any judgment justified by the pleadings and proof.

ACTION heard at chambers by *Guion, J.*, by consent, at Marshall, August 23, 1907, as of July Term, 1907, of BUNCOMBE.

The plaintiffs allege in their complaint that they executed a deed, absolute in form, for the land in controversy to the defendant, Garrison Roberts, upon the agreement then made by him that he would pay a debt of $600 due by them to the British-American Mortgage Company and secured by a deed of trust upon said land, and would cancel a note due by the plaintiffs to him of $200; and, further, that the deed should

operate only as a mortgage to secure the repayment of the said amount of $800 to the defendant. The plaintiffs also alleged that the defendant had received a large amount in rents and profits, which should be credited on the debt due by them. The defendant denied the allegations of the complaint, but, pending the cause, a consent decree was made, by which it was admitted that the defendant held the legal title to the lands in trust to pay the amount due him, which was at the time $789, with interest thereon from 20 April, 1897, and it was agreed that the plaintiffs were entitled to have the amount of the rents and profits received by the defendant credited thereon. Mr. J. G. Merrimon was appointed referee to state the account between the parties. It was directed in the decree that, upon payment of the balance found by the referee to be due to Roberts, the latter should reconvey the land to the plaintiffs, Roberts to retain possession of the land until the further order of the court, he having recovered the possession theretofore by summary proceedings in ejectment. The referee reported the sum of $702.27, with interest from 15 October, 1906, to be due by the plaintiffs to Roberts, with certain fees and costs to be taxed, the parties having agreed that they should be declared a first lien on the land in the judgment of the court. The court thereupon confirmed the report of the referee and adjudged that, unless the plaintiffs paid the balance so due by them within sixty days, the land be sold by a commissioner, named in the decree, who should make title to the purchaser and report to the court. The plaintiffs failed to pay the debt and the commissioner sold the land, after due advertisement, and the defendant, who was permitted by the decree to buy the land, became the purchaser. The commissioner prepared and signed the deed to him, but retained it until he had reported the sale to the court, and did not deliver the deed until his report had been confirmed. The plaintiffs excepted to the report of the referee and also to the decree of sale, and to all of the pro-

ceedings of the court based thereon, upon the ground that the court had no jurisdiction to order the sale, and that they were entitled to certain additional credits for waste committed on the land by Roberts and rents and profits collected by him, and from an order of the court overruling their exceptions they appealed to this Court. Their appeal was dismissed here, under Rule 17.

It was agreed that the defendant's motion to confirm the sale should be heard by *Judge Guion* on 23 August, 1907, at chambers, as of July Term, 1907. The motion was heard and the Judge found as facts that Roberts had offered in open court to transfer his bid to the plaintiffs on payment to him of $675, the amount of his bid, and had also proposed that the sale should be set aside if the plaintiffs would secure a 10-per-cent. increase of the bid by him, which offer and proposal the plaintiffs rejected. The Judge thereupon further found that the land had brought a fair and full price at the sale. It was therefore adjudged that the sale be confirmed and title be made to the purchaser, and that the purchase money be applied by the commissioner to the payment of the debt and costs, as provided by a former order of the court. The plaintiffs excepted and appealed.

F. W. Thomas for plaintiffs.
Gudger & Fortune for defendant.

WALKER, J., after stating the case: There was no substantial irregularity in the proceedings. There may have been a slight technical deviation from the usual course in such cases, but in no respect were the plaintiffs prejudiced. We do not think the plaintiffs are entitled at this late day to reopen the account and introduce additional evidence as to the new credits they set up for waste and rents and profits. It was decided at the last term, in *Williams v. McFadden,* 145 N. C., 156, that, "in an action to enforce a vendor's lien, where a definite indebtedness is declared and judgment there-

for entered and foreclosure by sale decreed, such judgment is final between the parties as to the amount of the indebtedness so adjudicated; but as to all subsequent questions arising as incident to the sale, the occupation and possession of the property by the parties, the collection and distribution of the proceeds, and the like, the decree is interlocutory." That case was likened to an action by a mortgagee to foreclose a mortgage, and it is not distinguishable in principle from the case at bar. Litigation could not well be ended under any other rule. The plaintiffs, of course, are not estopped to recover from Roberts upon any liability accruing since the decree was made, nor as to any which is not conclusively settled by the same.

As to the question of jurisdiction to proceed in the cause and to make the decree of sale, we have no doubt that his Honor, *Judge Guion*, is sustained in his ruling by the decisions of this Court. The consent decree merely declared the relations of the parties, converting the absolute estate conveyed by the deed into one upon condition subsequent, or a mortgage, and it surely was not the intent of the parties to deprive either of them of the benefits incident to the relation thus established. It was the intent and interest of the plaintiffs, on the contrary, to have this relation, with all its advantages, established and declared by the court, as they were handicapped in the prosecution of the suit by the fact that the deed, as it was written, conveyed an absolute or unconditional estate. Why should the plaintiffs be now permitted to take advantage of their own wrong? They negligently failed to have the condition, or the trust, as we may term it, expressed in the written instrument, and the court, with the consent of the parties and by its decree, has reformed the deed, so that they now stand in the same relation to each other as they would have stood in law and in equity if the original deed had been correctly drawn according to the true intent of the parties. The consent decree, therefore, virtually turns this action

into one to foreclose a mortgage. This brings us to the consideration of the specific objection raised by the plaintiffs' counsel. They insist, impliedly at least, upon a strict foreclosure of the mortgage, and that, if they do not redeem within the time limited, then the title should pass to the mortgagee, who is the defendant, or that he should be compelled to hold the land until by the rents and profits received by him the debt is paid—a living pledge (*vidum vadium*), resembling the estate held by *statute merchant* or *statute staple*. 2 Blk., 157-160. But it is the object of the law to settle finally and fully the rights of the parties and to put an end to litigation. Besides, where a trust relation exists, such as we have in this case, the rights of the parties are determined upon equitable principles. It has therefore been held, at least in this State, that where the debt is not paid at the time fixed by the decree of the court it is not according to the course of the court to decree a strict foreclosure or to order that the plaintiff's bill (now action) to redeem shall stand dismissed, but, in default of payment, to order a sale of the land conveyed by the mortgage and apply the proceeds to the payment of the encumbrance and the costs. The surplus, of course, goes to the mortgagor. *Ingram v. Smith,* 41 N. C., 97. It is said by *Nash, C. J.,* in *Averett v. Ward,* 45 N. C., at page 195, that, "in a case of mortgage for the purpose of discharging the debt, the most convenient course for both parties is primarily to have the land itself sold, giving to the debtor any surplus that may remain, and this rule is acted on in this State," citing *Ingram v. Smith, supra.* To the same effect is *Green v. Crockett,* 22 N. C., 390, a case very much in point, as it decides that it is not erroneous to order a sale when neither party asks the court for one. But under our Code system it is not required that a party should be confined to the specific relief which he demands. *Knight v. Houghtalling,* 85 N. C., 17. In *Vorhees v. Porter,* 134 N. C., at page 595, this Court said: "We hear the case upon the facts alleged in the plead-

ings, and if the plaintiffs have set forth in their complaint such facts as entitle them to relief they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional and different relief which is not inconsistent with the facts so alleged in their complaint, it being the pleadings and the facts proved which determine the measure of relief to be administered." And at page 597 it is said: "We find it to be well settled by the decisions of this Court that, if the plaintiff in his complaint states facts sufficient to entitle him to any relief, this Court will grant it, though there may be no formal prayer corresponding with the allegations, and even though relief of another kind may be demanded. *Knight v. Houghtalling, supra; Gilliam v. Insurance Co.*, 121 N. C., 369. In the case last cited, *Clark, J.*, for the Court, says: 'Under The Code, the demand for relief is immaterial, and the Court will give any judgment justified by the pleadings and proof,' citing numerous cases. Clark's Code (3d Ed.), p. 584, and notes to section 425."

There was therefore no necessity for any "cross bill" or specific prayer by either of the parties for relief by sale of the property. We apply the law to the facts as stated in the pleadings and established at the hearing, and award such relief as the parties may respectively be entitled to have in the premises, without regard to any special prayer.

The right of the defendant to have a sale of the land upon failure of the plaintiffs to pay the debt at the time fixed by the order was combated by Mr. Thomas in an able and learned argument before us, but we think the ancient rule has given way to the more enlightened modern practice of the courts, by which the rights of the parties are determined upon just and equitable principles and for the purpose of settling all matters in controversy. The sale of the land would seem to be beneficial to the plaintiffs if they were unable to pay the debt. We find no error in the rulings of the court.

No Error.

SOUTHERN RAILWAY COMPANY *v.* BOARD OF COMMISSIONERS OF MECKLENBURG COUNTY.

(Filed 25 May, 1908.)

1. Taxation—Constitutional Limitations—Equation Between Property and Poll Tax—Validity—Practice—Mandamus.

Mandamus to compel the commissioners of a county to collect a sufficient poll tax, under Article V, section 1, of the Constitution of North Carolina, is the proper remedy in an action by a taxpayer contending that a tax levied does not observe the constitutional equation between the poll and the property tax.

2. Taxation—Entire Levy—Valid and Invalid Apportionable—Injunction.

It is the practice, enforced usually by statute, for the court not to enjoin the collection by a board of county commissioners of an entire levy of taxes if the portion conceded in a suit by a taxpayer to be valid can be separated from the portion alleged to be unconstitutional.

3. Constitutional Law—Statutes—Duty of Courts.

The courts of the State will not declare a legislative enactment unconstitutional unless it clearly or convincingly appears to them to be so.

4. Constitutional Law—Taxation—Interpretation of Statutes—Construed as a Whole—Special Tax—Validity.

Article V, section 1, of the State Constitution, providing an equation between the poll and property tax, and section 6 thereof, requiring that "the tax levied by the commissioners of the several counties for county purposes shall never exceed the double of the State tax, except for a special purpose and with the special approval of the Legislature"; and Article VII, section 7, thereof, prescribing the limitations upon the counties, etc., to contract debts for other than necessary expenses, should be construed in relation to each other, and thereunder a special tax voted by the people of a county, specially authorized by the Legislature, is not unconstitutional by reason of an increase thereby of the property tax over the constitutional equation between the general property and the poll tax.

5. Constitutional Law—Poll Tax Not to Exceed $2.

The last clause in Article V, section 1, of the State Constitution, limiting "the State and county capitation tax combined," so as not to exceed $2 on the head, is imperative.

6. Taxation for Special Purpose—County Commissioners—Ministerial Duties—Injunction.

The courts, at the suit of a taxpayer, will not enjoin a tax levy made by a board of county commissioners in pursuance of their ministerial duty, for that they did not wisely exercise their discretion in fixing a greater rate of taxation on the $100 worth of property than was necessary for the purpose of paying the interest on a special indebtedness of the county, when practically all of the other taxpayers of the county have paid the tax in pursuance of the levy and the statutory limit has not been exceeded.

7. Same—Excess Levy, How Applied.

When a tax has been levied for the special purpose of paying the interest on special-tax county bonds it must be exclusively applied to that purpose; and if, by any error in the judgment of the county commissioners, a greater property tax rate has been levied than was necessary, the commissioners have no power to apply the excess to a different use. Should they attempt to do so, an injunction will lie at the suit of a taxpayer.

8. Statutes in Violation of Contracts—Parties—Constitutional Questions, by Whom Raised.

When a taxpayer has not shown that any rights of his in relation to a bond issue by a county have been affected, he cannot avail himself of the contention that a subsequent statute, repealing the statute under the provisions of which the issue was made, violated the obligations of a contract.

ACTION for injunction, heard by *Moore, J.*, 24 March, 1908, by consent, at chambers in Asheville, from MECKLENBURG.

The plaintiff seeks to enjoin the collection of certain taxes assessed against its property by the defendant Board of Commissioners of Mecklenburg County, for that, it is alleged, the assessment and levy of said taxes are in contravention of Article V of the Constitution of the State. The Judge granted a restraining order, with a rule to show cause why an injunction should not be granted to the hearing. On the return of the rule the plaintiff and defendant filed verified pleadings, and from the averments therein the court found the facts set forth in the opinion, and continued the injunction to the final hearing. Defendant appealed.

W. B. Rodman and *A. B. Andrews, Jr.,* for plaintiff.
Burwell & Cansler for defendant.

CONNOR, J. For the purpose of disposing of the question which confronts us at the threshold of this controversy, the following facts found by his Honor are sufficient: The defendant board of commissioners, in whom is vested by law the power and duty of assessing and levying county taxes, at its meeting in June, 1907, levied the following taxes upon each $100 worth of all of the real and personal property in said county:

1. State tax	.21
2. Pension tax	.04
3. School tax	.18
4. County tax	.23⅔
	.66⅔
At the same time said board levied upon every taxable poll in said county	$2.00
At the same time said board levied the following taxes upon said property:	
1. For public roads, pursuant to section 8, chapter 50, Laws 1901	.10
2. For bonds, pursuant to chapter 146, Laws 1889, amended by chapter 2, Laws 1901	.15
3. For convicts, pursuant to chapter 24, section 1355, Revisal	.25
	.50

The tax lists, duly endorsed by the clerk of said board, as required by section 5238, Revisal, were delivered to the defendant M. W. Wallace, Sheriff, and the other defendants, tax collectors of certain districts, as set forth in the complaint. No other poll tax than the $2 was levied. In this respect the

commissioners acted in obedience to the provisions of chapter 840, Laws 1905, which prohibits the poll tax, except for special school tax, to exceed $2. The property of plaintiff in said county is valued at the sum of $2,075,954.28. Plaintiff has paid all of the taxes assessed as aforesaid against its property for the present year, except the assessment for roads, convicts and bonds, aggregating $10,379.77. In respect to these assessments plaintiff alleges: "That the said assessment for public roads and special for bonds, and convict tax, as complainant is informed and believes, have been authorized to be levied by the various acts of the Legislature of the State of North Carolina, which direct and require the imposing and levying of the tax upon each taxable poll in the county equal to the tax on $300 worth of assessed property valuation, which poll tax provision, the defendant board of county commissioners claims, has been repealed by the provisions of Acts of 1905, ch. 840, which are as follows:

" 'Section 1. No city or town in Mecklenburg County shall levy a poll tax in excess of $2, and all provisions to the contrary in the charter of any such municipality are hereby repealed.

" 'Sec. 2. The equation of taxation prescribed in the Constitution applies only to taxation levied for the ordinary purposes of the State and county, and no poll tax shall be levied, except as hereinafter provided, in excess of $2, for State and county purposes combined; and all acts levying or authorizing the levy of taxes for special purposes which contain authority to levy a poll tax in excess of $2 in the aggregate for all purposes are hereby repealed or modified so as to restrict and provide that the poll tax for State and county and special taxes combined shall never exceed $2: *Provided*, that this act shall not be construed to affect and shall not affect the district or any other special school taxes on the poll where they are now required to be levied by law, nor the right to levy and collect the same according to law.'

"8. That the complainant is informed and believes that the said chapter 840 of the Acts of 1905 is unconstitutional and void for the following reasons:

"(*a*) For that it is in conflict with the provisions of Article V, section 1, of the Constitution of the State of North Carolina, in that it does not observe the equation between the tax on $300 worth of property and each taxable poll.

"(*b*) For that, as applied to the bonds issued under the act of the Legislature of North Carolina (Acts 1889, ch. 146), which enters into and is a part of the contract between the County Commissioners of Mecklenburg County and the bondholders, it is in conflict with the provisions of Article I, section 10, clause 1, of the Constitution of the United States of America, which provides: 'No State * * * shall pass * * * law impairing the obligation of contracts.'

"(*c*) For that it is in conflict with the provision of Article XIV of the Amendments to the Constitution of the United States.

"The complainant hereby especially invokes the protection of the before-recited sections of the Constitution of the State of North Carolina and of the Constitution of the United States as fully and completely as the same is guaranteed to their citizens."

Plaintiff refers to the provisions of section 5238, Revisal, which makes the tax list, when properly endorsed by the clerk of the board and delivered to the sheriff, a judgment and execution against the property of the taxpayer. By section 5296 the taxes assessed against railroads are made a lien upon all the property owned by them in this State. Plaintiff further alleges that the lien thus created is a cloud upon its title, which entitles it to maintain the action. Section 2855 provides that, unless a tax or assessment or some part thereof be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted, etc. Defendant does not question the right of the plaintiff to invoke

the equitable power of the court or to raise the question presented in its complaint. It has been held by us that injunction is the appropriate remedy for avoiding the enforcement of an illegal or unconstitutional tax. *Purnell v. Page,* 133 N. C., 125. It is not clear that, conceding plaintiff's contention to be correct, it is entitled to enjoin the collection of the tax upon its property which is properly assessed and due. It would seem that the remedy is a *mandamus* to compel the commissioners to levy the poll tax if it is their duty to do so. In *Russell v. Ayer,* 120 N. C., 180, the General Assembly had failed to levy the poll tax as prescribed by the Constitution. It was held by a majority of the Court, although the view of the dissenting Justice was very forcible, that this failure rendered the entire act invalid. Here the statutes pursuant to which the taxes are levied direct that a poll tax in accordance with section 1, Article V, shall be levied. The commissioners, in obedience to the act of 1905, ch. 840, did not levy the poll tax. The failure to do so did not invalidate the property tax. Assuming that the act of 1905 is invalid, the relief to which plaintiff, in behalf of itself and all other taxpayers, was entitled was a *mandamus* compelling the commissioners to perform a ministerial duty. This would be more in accord with the rights of the taxpayer and the county. It is the practice, enforced usually by statute, for the court not to enjoin the collection of the entire levy if the portion conceded to be valid can be separated from the portion in controversy. We call attention to this for the purpose of suggesting that it is proper to resort to the most efficient remedy which interferes in the smallest degree with the collection of the public revenue. The defendant makes no point in respect to the remedy invoked, and, as the question involved is fairly presented and has been ably and exhaustively argued by counsel, we will examine and decide it. The identical question would be presented if the action was for a *mandamus.* Although the sections of Article V of the Constitution have been in the

organic law since 1 August, 1868, it is doubtful whether the question raised upon this record has been decided by this Court. Both parties insist that, if not expressly decided, language has been used by the Court in a large number of cases which should control us in disposing of the appeal. They draw, however, radically different conclusions from the opinions and discussions of the Court. As said by *Merrimon, C. J.,* in *Jones v. Commissioners,* 107 N. C., 264, "We know that it has been said, *obiter,* in several cases that the equation and limitation of taxation referred to above must be observed in levying taxes for municipal purposes." So, in regard to the question presented here, we find many expressions in opinions indicating that the equation is imperative and must be observed in levying all taxes, for special as well as general purposes. We also find much indicating the contrary view. In this condition of our decisions it becomes necessary to examine the cases, with the exact facts upon which they are based, cited in the well-prepared briefs of counsel, and endeavor to ascertain what, if any, decisions have been made, and the extent to which they are authoritative declarations of the law. It is evident that the question is regarded as an open one and must be settled upon some permanent basis. The revenue system of the State should, so far as possible, be simple and easily administered. The portions of the Constitution relating to the question in controversy are in Article V, entitled "Revenue and Taxation": "Section 1. The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash, * * * and the State and county tax combined shall never exceed $2 on the head." Section 2 applies the State and county capitation tax to the purposes of education and the support of the poor. Sections 3, 4 and 5 have no direct relation to the question under discussion. Section 6: "The taxes levied by the commissioners of the several

counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose* and with the special approval of the Legislature." In these sections we find the entire scheme or system of taxation on real and personal property and the poll. Article VII, section 7, prescribes the limitation upon the power of counties, cities and towns to contract debts for other than necessary expenses, and the method of doing so. It is conceded that the State and county tax upon property has been assessed to the full constitutional limit, and that a tax on the poll, as limited by section 1, has likewise been levied. The controversy arises upon the "road," "convict" and "special bond tax" levied upon the property of plaintiff, no corresponding poll tax being levied. If, therefore, as contended by plaintiff, the equation prescribed by section 1, Article V, extends and applies to every special tax for every special purpose, with the special approval of the General Assembly or by the vote of the people, it is manifest that the act of 1905, ch. 840, pursuant to which the commissioners acted, is invalid, and, notwithstanding its prohibition, they must levy the tax on each poll for an amount corresponding to the tax on property. They proceeded upon the correct principle in treating the act as valid. Two questions are open to us: First. Has this Court decided the question, and if so, how? Second. If not, what is the correct interpretation of the Constitution in respect to the question presented upon the record? In reviewing the cases to which our attention is called—and they include all that can be found in our reports—it will be well to keep in mind that, while the language of the sections has not been changed, section 4 of Article V of the Constitution, as ratified (1868), has been eliminated, and thereby section 7 therein has become section 6 of the present Constitution. Section 4, Article V, imposed upon the General Assembly the duty of providing "by appropriate legislation and by adequate taxation for the prompt and regular

payment of the interest on the public debt," etc. The Justices of this Court, in *Railroad v. Holden,* 63 N. C., 410, writing separate opinions, were all of the opinion that the equation prescribed by section 1 did not apply to taxes levied for the payment of interest on the public debt, as provided by section 4. The only *question decided* by the Court in that case was that the plaintiff was not a corporate entity and had no power to demand or take the bonds voted to it by the General Assembly. The action was for a *mandamus* to compel the defendant, the Governor, to deliver the bonds. The relief was denied for the reason stated. For reasons obvious to those acquainted with the history of the State and the peculiar conditions then existing, each of the Justices wrote an opinion expressing his views regarding the proper construction of the different sections of Article V. The Legislature, then in session, had increased and was continuing to increase the public debt, issuing bonds at a rate which threatened to bankrupt the State. One of the Justices had been an able and influential member of the Convention of 1868, which framed the Constitution. The Constitution of 1776 contained no reference to a poll or capitation tax. By the amendments of 1835 (Article IV, section 3, Rev. Code) it was provided that the capitation tax should be equal throughout the State. This is the only reference to the subject in the Constitution prior to 1868. For the first time in our history we find the peculiar provision in Article V, section 1, the authorship of which has been attributed to more than one distinguished citizen. The Court elected pursuant to the new Constitution held its first term in January, 1869. It was at the June Term of the same year that the case of *Railroad v. Holden* came up. These facts and others stated in the opinions explain why such an unusual course in our judicial history was pursued. *Pearson, C. J.,* was of the opinion that the equation prescribed by section 1 did not apply to taxes levied pursuant to and for the purposes embraced in section 4 (interest on the

public debt), but did apply to section 5, limiting the power of the General Assembly to contract new debts until the bonds of the State were at par, except for the purpose of providing for a casual deficit or to suppress invasion or insurrection. After making an analysis of the several sections and explaining their purpose and effect, he copies the language of section 4 and says: "It is enough to admit that this tax is to be independent of the equation, *as in section 7 (6) a tax for a special purpose, with the special approval of the General Assembly, may be laid without reference to the equation.*" By the words "it is enough to admit" the Chief Justice was laying the basis for his argument that it was only for *these purposes* that the equation did not apply. He proceeds to give his reason for refusing to carry this construction into section 5.

Mr. Justice Rodman, who was a member of the Convention, was of the opinion that it was "too plain to admit of an argument that the intent of this section (section 1) was to establish an invariable proportion between the poll tax and the property tax, and that, as the former is limited to $2 on the poll, so is the latter to $2 on the $300 valuation of property." The learned Justice proceeds to give an interesting and instructive explanation of the reasons which prompted the adoption of the scheme or system of taxation, with its checks and counterchecks, concluding: "This proportion and this limit apply equally to all State taxes whatever, but not with equal force. As to some it is absolutely imperative, and a tax laid contrary to its provisions would be void. As to others, from the nature of the objects of the tax and from the provisions of the Constitution, it seems to me to be merely directory; that is to say, addressed to the discretion of the Legislature and to be regarded if consistent with the great objects of the Constitution, but if these cannot be attained within the limit and proportion prescribed, then to be disregarded. And of this possibility the Legislature must necessarily be the exclusive

judge." The learned Justice proceeds to state the exceptions and give his reasons therefor, saying: "When we consider the uncertainty which must necessarily have existed as to whether taxation within the limits prescribed by section 1 would suffice for these cherished purposes (payment of the interest on the public debt), and the tax to effect them is to be laid on property alone, thereby entirely disregarding the proportion established by section 1 between property and poll, we are forced to the conclusion that section 4 was intended to be in all respects independent of section 1, if it should be found necessary to render it so in order to give it effect." In respect to section 5 he says: "I am therefore of the opinion that the limitation of taxation prescribed by section 1 is not imperative as respects taxes laid for the purposes contemplated in section 5; that it must of necessity be construed as only directory or monitory to the Legislature, and that its observance cannot be enforced by the courts." The closing sentences of *Judge Rodman* manifest a recognition on his part that at the threshold of the "new order" unexpected difficulties and conditions were rendering ineffectual the plan, which he refers to as "being original," for limiting the taxing power. He concedes that the construction placed by him on the work of the Convention "may possibly be unsatisfactory to two classes of persons." It would seem from his language that, having repudiated the war debt and hoping for "wise and patriotic legislation," he believed that the State and county expenses could be met by a levy of $2 on each $300 of valuation of property and $2 on the poll. It is interesting to read his well-considered words, in the light of the history of the succeeding years. *Mr. Justice Reade* says: "The first object of the Convention, in the fifth article of the Constitution, was to provide for the *ordinary* and *current* expenses of the government. That is done in sections 1, 2 and 3. And *for that purpose* the tax is limited to $2 on the poll and the same amount on $300 worth of property." He does not refer

directly to the question under discussion. *Mr. Justice Dick* does not discuss the question in a way to throw any light upon the subject, except to say: "The object of the Convention, in Article V, was to provide a system of general taxation for the ordinary expenses of the government, which is to operate with a just equality upon the citizens and property of the country. The capitation tax is limited to $2 on the head, and for the purposes of *general* taxation the $300 worth of property cannot exceed that amount. * * * If it was intended that the special taxes mentioned in sections 4 and 5 were to be restricted by the equation established in section 1, then we must believe that the Convention either greatly overestimated the sources of taxation or was not honest in its pledges" regarding the public debt. He was of the opinion that the equation did not apply to section 4 or section 5. *Mr. Justice Settle* was of the opinion that the "equation of taxation" applied only to the ordinary expenses of the State government. Having discarded the equation of taxation for limited purposes, he says: "I must go where the principle carries me," holding that the equation did not apply to either section 4 or section 5. It will be noted that *Judge Settle* was the youngest member of the Court. He concludes: "I believe there is no diversity of opinion as to the power of the county to levy taxes for county purposes. I will not repeat the position, as it is stated in the opinion of the Chief Justice and *Justices Reade* and *Dick*." We have endeavored to analyze the views of the members of the Court expressed in this case. They were all eminent for learning and powers of reasoning, and were in accord with the dominant thought of the Convention which framed the Constitution. Their opinions in this case were frequently referred to by themselves in other cases, and, while not authoritative, they have been regarded as the basis of the later interpretations of these sections of the Constitution. From an analysis we think that certain general conclusions may be drawn. All of the Justices except *Jus-*

tice Rodman regarded the limitation and equation in section 1 as applicable to the taxes levied for general State and county purposes. *Judge Rodman* was strongly impressed with the opinion that section 1 applied to all taxes, but conceded that it was impracticable to reconcile this view with the enforcement of the declaration and demands regarding the public debt, and adopted a "middle ground" in regard to section 5. *Judge Settle* expressed by the last words in his opinion the opinion of the Chief Justice in regard to the county taxes, as concurred in by *Judges Reade* and *Dick*. We have quoted the exact language of the Chief Justice in this respect. While it is conceded by all that nothing in this respect is *decided*, we think that there is a clear recognition of the necessity of restricting the limitation and equation prescribed by section 1. It would seem that the process of reasoning which excludes the equation from taxes levied under sections 4 and 5 would lead to the same result in respect to taxes levied by counties "for special purposes, with the special approval of the General Assembly." If the limitation and equation apply only to general taxes levied for the necessary current expenses of the State and county government, and not to special taxes levied pursuant to sections 4 and 5, why should not the exclusion extend to taxes levied by counties "for special purposes, with the special approval of the General Assembly"? As we have seen, *Judge Pearson* associated taxes levied pursuant to section 4 and section 7 (6) for special county purposes, etc., with those which might "be levied without reference to the equation."

It will be observed that no provision is made for the payment of county indebtedness contracted prior to 1868. Prior to 1861 but few counties had contracted debts. By section 13, Article VII, the debts contracted by counties during the Civil War were repudiated and their payment prohibited. Either the members of the Convention thought that the outstanding county debts could be paid by levying taxes within

the limitation or that the term "public debt" used in section 4 included county debts. Between 1865 and 1868 the counties had but little credit and contracted but little indebtedness. It may be that it was supposed that the last clause of section 7 (6) would enable the counties to provide for their debts by "special taxes for a special purpose." However this may be, for reasons now manifest, the necessity for providing for such indebtedness was soon presented, and the Court found it necessary to make another exception to the limitation and equation prescribed by section 1. In *Haughton v. Commissioners,* 70 N. C., 466, *Justice Reade* says the limitation upon the power of the counties to levy taxes "was not intended to apply to taxes levied to pay debts existing at the time of the adoption of the Constitution; and if it had been so intended, it would have been in conflict with the Constitution of the United States as impairing the obligation of contracts." The commissioners had levied a tax in excess of the limitation upon property and the poll to pay existing indebtedness. The same ruling was made in *Simmons v. Wilson,* 66 N. C., 336. In *Street v. Commissioners,* 70 N. C., 644, it appeared that the county of Craven had contracted a debt in 1854 for the purpose of aiding in the construction of the Atlantic and North Carolina Railroad. To provide for the interest the commissioners levied a tax in excess of the limitation and disregarded the equation between the property and the poll tax. In disposing of the objection urged against this tax *Reade, J.*, says: "That objection is well taken if the equation of taxation applies to taxes levied for the payment of debts existing at the adoption of the Constitution. But in *Railroad v. Holden* it was held by all of the Justices that the equation did not apply to taxes to pay the public debt existing at the adoption of the Constitution *or for special county purposes.*" This language was concurred in by the unanimous Court, having the same *personnel* as when the first case was decided, with the exception of *Judge Bynum*, who had succeeded *Judge*

Dick. In *Mauney v. Commissioners,* 71 N. C., 486, the *point* presented by the order made by *Judge Buxton,* and decided, was that for debts contracted prior to 1868 the commissioners must provide by taxation, without regard to the limitation, while for "new debts" they must have the approval of the General Assembly to exceed the limitation. There was no reference in the order to the equation. *Settle, J.,* disposed of the case in a few lines, saying: "We concur in his Honor's views as to the constitutional limitation and equation to be applied to the different debts." As we have said, there is no reference to the equation by *Judge Buxton.* In *Trull v. Commissioners,* 72 N. C., 389, the same language is used, citing *Street's case* and *Mauney's case, supra.* There was no act of the Legislature approving the tax in excess of the limitation. It was held that, in so far as it was necessary to exceed the limitation to provide for the payment of old debts, the levy was valid, and invalid as to all in excess of that amount. In *French v. Commissioners,* 74 N. C., 692, it appeared that, without any act of the General Assembly approving a levy in excess of the limitation, the commissioners, for the purpose of paying an indebtedness contracted since 1868, levied a tax in excess of double the State tax. There is no reference in the facts stated or the opinion to the poll tax or the question of equation. *Bynum, J.,* says: "If what are called 'necessary expenses' of a county exceed the limitation prescribed by law, the necessity cannot justify the violation of the Constitution. In such cases two remedies are open to the county. One is to apply to the Legislature if the tax is required for a special purpose. The Constitution (Art. V, sec. 7, subsec. 6) empowers the Legislature in such cases to give a special approval for an increased levy. The older and better way, however, is to reduce expenditures." Following this case we find *Carrow v. Commissioners, ib.,* 700; *Griffin v. Commissioners, ib.,* 701, involving the same question and disposed of by the Court

by referring to the opinion in *French's case.* In *Brothers v. Commissioners, ib.,* 726, the commissioners, for the purpose of raising taxes to pay an "old debt," levied a tax on property in excess of the limitation and a corresponding tax on the poll. This was sustained in an opinion by *Mr. Justice Rodman,* holding that, as there was no limitation on the power to tax for the purpose of paying "old debts," the limitation of $2 on the poll did not apply. He said that it was discretionary with the Legislature to levy the tax on the poll or not, as it thought best. Here we find that the Court adopts the view expressed by *Judge Rodman* in *Railroad v. Holden,* that, in levying taxes to pay debts existing at the adoption of the Constitution, it was discretionary with the Legislature to adopt or reject the equation. *Settle, J.,* dissented, saying: "It is clear that the limit of $2 on the poll cannot be exceeded for the payment of any debt, State or county, contracted *since* the Constitution; for, while the poll tax is specifically appropriated for the purpose of education and the support of the poor, * * * it is manifest to my mind that the spirit of the Constitution requires that the taxes be taken from the poll, except to the extent of $2, to be applied to the purposes of education and the support of the poor, and be placed upon the property of the State. It is at least ungracious to exercise the sovereignty to tax a man's head, especially when he has nothing else to tax." He seems to have overlooked the language used by him in *Mauney's case, supra.* It will be noted that the excess over $2 in *Brothers' case* was to provide for "old debts." *Clifton v. Wynne,* 80 N. C., 145, simply reaffirms what is said in *Street v. Commissioners, supra,* and the other cases cited. In *Cain v. Commissioners,* 86 N. C., 8, the only question involved was as to local assessments for building a fence around a stock-law district. *Cromartie v. Commissioners,* 87 N. C., 134, decides that, "without the special approval of the Legislature, the commissioners cannot exceed the limit, except for the payment of 'old debts.'" No other

question is involved or discussed. *Evans v. Commissioners*, 89 N. C., 154, is not in point. In *Barksdale v. Commissioners*, 93 N. C., 472, the only point decided was that, for the purpose of keeping the public schools open four months, the commissioners could not exceed the limitation imposed by section 1. *Smith, C. J.*, says: "The levy finds no support in section 6 of Article V, for this is not one for a special purpose." The following language of the Chief Justice is significant: "Our decision rests upon the interpretation heretofore repeatedly given to the clause that directs the imposition of a poll tax equal to that imposed upon property valued for taxation at $300, by which the taxes are both thus associated, and arrested when on the poll they reach the maximum of $2." After discussing the policy of putting the limitation to taxation on property, he says: "There was a propriety in fixing a limit to the poll tax, because the fund raised from this source is appropriated exclusively to two objects, the support of the poor and the providing means of free education; but it was impracticable to foresee the needs of the State for moneys for its future management. And it is to be observed that the equation is only to determine the measure of the personal or poll tax, so long as it can be levied for the special objects mentioned and up to its fixed limitations." While upon the principal question decided *Barksdale's case* has been overruled, this language is pertinent as indicating the opinion of the Court as then constituted. What it would have held if the tax had been levied for a special purpose we cannot say. *Parker's case*, 114 N. C., 166, is not in point. *Board of Education v. Commissioners*, 111 N. C., 578, is based upon *Barksdale's case*. The language of *MacRae, J.* (p. 580), clearly shows that the Court held to the opinion that the limitation and equation were restricted to "the ordinary expenses of government, both State and county." *Avery, J.*, dissented, adopting the opinion of *Merrimon, J.*, in *Barksdale's case*. *Williams v. Commissioners*, 119 N. C., 520, has no bearing

upon this appeal. In *Herring v. Dixon,* 122 N. C., 420, the only question presented and decided was whether a tax for working the public roads was for a special purpose for which the Legislature could authorize the levy of a property and poll tax beyond the limitation. No question of equation was presented, because the poll tax was levied. The same is held in *Tate v. Commissioners,* 122 N. C., 812. In *Jones v. Commissioners,* 107 N. C., 248, it appears that certain townships in Person County were by act of the General Assembly empowered by a vote of the people to issue bonds to aid in the construction of a railroad and to levy a tax upon *all property* in the townships. Plaintiffs sought an injunction against the issue of the bonds, assigning a number of objections to the act of the Legislature and the validity of the election. *Merrimon, C. J.*, says that, among other reasons, it was urged that the act was void "in that it authorized a tax upon property alone and not upon polls," etc. After discussing the question at length, he concludes that the limitation and equation prescribed by section 1, Article V, did not apply to taxes levied to pay interest and principal of bonds issued by municipal corporations pursuant to Article VII, section 7. The general discussion is along the same lines as in the preceding case. The question regarding the limitation on counties for special purposes is not presented, because the county had not proposed to issue any bonds. He distinguishes counties as *quasi* municipal from cities and towns as municipal corporations. He says that ordinary expenses, for which the Legislature may approve a special tax, are such as are incurred for building courthouses, bridges, etc. He further says that, while there is much *dicta,* there has been no decision of the question. In *Board of Education v. Commissioners,* 137 N. C., 310, the question presented was whether the poll tax levied pursuant to a special act authorizing a property and poll tax for the purpose of working the roads could be applied to that purpose, or whether section 3, Article V, applied it to

education and the support of the poor. The tax had been levied and paid. We were confronted with the provisions of section 3 and of section 7. "Every act of the General Assembly levying a tax shall state the object to which it is to be applied, and it shall be applied to no other purpose." We felt constrained to give effect to the last section. We felt the force of the contradictory sections, and the writer of that and of this opinion referred to the construction placed upon the Constitution by the Court in *Jones v. Commissioners,* and said: "We are constrained to hold that the act under which the tax to work the roads of Macon County was authorized necessarily provided for the capitation tax, and that its collection was lawful." We concluded the opinion with the statement that "it was best to decide only the question before us." In *Collie v. Commissioners,* 145 N. C., 170, in which this Court reviewed and overruled the *Barksdale case,* this language is used, with the approval of four members: "While the General Assembly must regard such limitation upon its power to tax as defined in many decisions of this Court, when providing for the carrying out of objects of its own creation and the ordinary and current expenses of the State government, yet, when it comes to providing for those expenses especially directed by the Constitution itself, we do not think the limitation was intended to apply. Although the Legislature must observe the ratio of taxation between property and the poll provided in Article V, section 1, it is not required to observe the limitation upon the poll and the property tax if thereby it is prevented from giving effect to the provisions of Article IX." *Mr. Justice Walker,* in a concurring opinion, says: "The general limit of taxation is fixed, of course, at 66⅔ cents on the $100 in value of property, as I have already indicated, by the provision in regard to the equation and the maximum of the poll tax, which is $2 on the $300 of property at its true value in cash. All the above provisions were evidently intended to apply to taxes levied for

general State and county purposes, and could not by any admissible rule of interpretation apply to the taxes required for the support of the schools." Again he says: "To my mind, at least, it is perfectly clear that this power of taxation in order to educate and enlighten the people is not in any way subject to the provisions as to the limit of taxation fixed by other articles and sections of the Constitution, but what is known as the equation must be just and not necessarily inconsistent with Article IX, and perhaps should be observed. It is not necessary that I should express any binding opinion as to this matter." We have endeavored to note every case from which any light may be found upon this difficult question. We have read the "discussion by *Mr. Justice Rodman*, 66 N. C., Appendix," with interest. It is evident that he had given the questions arising upon the system of revenue and taxation established by the Constitution mature, anxious consideration. With his uniform candor he says: "On so difficult and novel a question it would be unbecoming to be rash or dogmatic. I entertain my opinions with great respect, not only for those of my brethren, but of all other candid thinkers."

In *State v. Godwin et al.*, 123 N. C., 697, the defendants were indicted for not performing certain duties imposed upon them as supervisors of the public roads. They averred that they had been advised by counsel that the statute imposing such duties was invalid, because it levied the tax upon property only and not on the poll also. The real question, therefore, was whether they had unlawfully and willfully violated their duty. It is true that the Court said that the act was invalid for that reason. It is manifest that the question was not given much consideration. No authority is cited. We cannot treat or consider this decision as controlling and final in respect to so important a question, in the absence of any other decision so holding. It is clearly held in *Broadnax v. Groom*, 64 N. C., 245, that a tax to provide for building bridges is for a special purpose, within the meaning of sec-

tion 6. It would seem that the term, "for county purposes," used in section 6 should be construed to mean ordinary current expenses of the county government; otherwise no significance is given to the words "special purposes," the distinction being between ordinary usual county purposes, which cannot exceed "double the State tax," and special county purposes, which may, with the "special approval of the General Assembly," do so. It may be that, as suggested by *Judge Rodman*, the framers of the Constitution intended that, for both ordinary and special purposes, the State and county tax combined should never exceed $2 on the $300 valuation of property; that the only purpose of making a distinction between ordinary county purposes and special purposes was to prevent the counties from levying "more than double the State tax" without the special approval of the General Assembly, and that with such approval the entire tax for ordinary and special purposes should not exceed the limitation. This construction was rejected as impracticable, *Settle, J.*, saying: "It is admitted that the State government itself cannot exist twelve months under this construction of the Constitution." If the framers of the Constitution supposed that under the "new order" which they were inaugurating in this State the limit which they undertook to fix upon taxation was practicable, it is not the first instance in the history of mankind showing that wise, far-seeing statesmanship, with an intimate knowledge of the past and familiar acquaintance with the present conditions of a people, is essential to the construction of a system of government suited and adapted to their future welfare. We cannot read the opinions of the Justices in *Railroad v. Holden, supra*, without seeing that *they* saw that the system or scheme of taxation was impracticable unless exceptions were made. The position that no taxes could be levied beyond $2 on the $300 worth of property for any purpose was rejected by all of the Justices. The suggestion that, after that limit was passed, the amount of the poll tax is left to the uncontrolled discre-

tion of the General Assembly we do not think finds support in the language of the Constitution, but is excluded by the positive command that "the State and county tax combined shall *never* exceed $2 on the head," and the further provision limiting its application to the purposes of education and the support of the poor. In the light and with the aid of all that has been written on the subject, we do not think that there is any tenable "middle ground" upon which to permanently rest the solution of this question. Either the equation between the poll and the property tax must run through and control every section of Article V, as well as Article VII, section 7, without any power in the General Assembly to disregard it, or it must be confined to taxes levied for the "ordinary current expenses" of the State and county governments, observing the positive command that the "State and county capitation tax combined shall *never* exceed $2 on the head." As we have seen, the first alternative has been rejected, and to enforce it would arrest the State and counties in their varied spheres of progress and development. An examination of the returns of the State Tax Commission for 1907 discloses the fact that sixty-eight of the ninety-seven counties (the last one formed not being organized) levied for ordinary county purposes to the full limit of 23⅔ cents on property, the State taking 43 of the 66⅔ cents. The others exceed that amount. This does not include special taxes for subscriptions to railroads, building new courthouses and jails, iron bridges, road improvements, etc. If we adopt the other construction we confine the poll tax "for all purposes" to $2, as provided by the Constitution, and apply it to the purposes directed—education and the support of the poor, and "to no other purpose." It makes the capitation tax uniform throughout the State, thus restoring the principle incorporated in the Constitution of 1776 as amended in 1835. It conforms to the express declaration of the people as expressed in the amendment ratified in August, 1900, which provides that "every person

presenting himself for registration shall pay, and *before he shall be entitled to vote he shall have paid, on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year, as prescribed by Article V, section 1, of the Constitution.*" It is a strange anomaly to say that, while the right to vote is restricted by the payment of a poll tax which "shall never exceed $2." the voter may be disfranchised for failure to pay a poll tax the amount of which is left to the discretion of the General Assembly, the Constitution thus guaranteeing to every citizen otherwise qualified the right to vote by paying a poll tax of $2, and, by construction, giving the General Assembly the power to increase it to any amount they may deem proper. Whatever may have been the construction prior to January 1, 1901, we find in this amendment, which then became a part of the Constitution by the vote of the people, a construction which gives full force and effect to the provision that the State and county capitation tax combined shall never exceed $2, as prescribed in Article V, section 1. The State Tax Commissioners, in their report to the Governor for 1902, use this language: "We recommend that the poll tax be not levied except as a State and county tax, and that in no case shall the State and county capitation tax combined be greater than $2 a head, and that all laws authorizing municipalities to levy taxes on polls be repealed." They call attention to the constitutional provision. In their report of 1904 they renew the recommendation "that the poll tax levied under Article V, sections 1-6, of the Constitution, be not permitted to exceed $2 on the head. This recommendation is made because the Constitution limits it to this sum. See Article V, section 1; opinion of *Judge Rodman*, Appendix to 66 N. C., 520. And experience has demonstrated that this is as much as those liable for it have ability to pay." They call attention to the fact that 34,980 out of the 273,838 polls listed for the year 1903 were insolvent. Their very well-considered comments

are worthy of serious consideration. The attention of the Legislature being called to the subject, we find that it has in two statutes (chapter 840, Laws 1905, of local application, and chapter 935, Laws 1907, of general application) expressly declared its construction of the Constitution and repealed all laws which conflicted with such Constitution; certainly as to towns and cities, if not to counties. While not conclusive or binding upon us, this construction is entitled to much weight, and, as uniformly held by us, the statutes will not be declared void unless we are fully convinced, after much careful consideration, that they are clearly in conflict with the Constitution. They indicate that the subject is exciting the attention of the General Assembly. We have approached the consideration of it with the aid of able, exhaustive oral arguments and well-prepared briefs. As said by many of the Justices of this Court, it is fraught with difficulty. No one felt this more strongly or gave it more anxious thought than *Mr. Justice Rodman,* who, in his last expression in regard to certain phases of it, says: "On so difficult and novel a question it would be unbecoming to be rash or dogmatic." 66 N. C., Appendix. He and his associates were called upon to consider it at a time and under conditions which were most embarrassing. The State had entered into a "new order," with new forces controlling her affairs. Many who were most hopeful of the wisdom and success of the experiment soon became doubtful and discouraged. Her debt was increasing and the expenses of administering the government, both State and county, were increasing, while her resources and wealth were decreasing. The majority of those who in the past had guided her course and administered her affairs were disfranchised. Everything was unsettled and uncertain. As said by the Chief Justice and *Justice Rodman*, it was felt necessary to place checks upon the different classes of voters to prevent confiscation on the one hand and oppression on the other. It is difficult to understand the environment in which the

opinions in *Railroad v. Holden* were written, unless we recall conditions and tendencies which we would otherwise prefer to forget. After forty years we are called upon to review their words and opinions under happier and more hopeful conditions. The State debt is well in hand, her bonds are at and above par, her credit is unquestioned, the interest is provided for by a low rate of taxation, her railroad stocks have become very valuable. The resources of the State have reached proportions rendering it easy to provide for current expenses and to care for the unfortunate and afflicted, to educate her children, to promote all proper and reasonable enterprises making for the honor and welfare of the State. The counties are improving their public highways, their public buildings, and in all proper ways responding to the aspirations of an educated, patriotic, progressive, hopeful people. The wage-earner, amidst this general progress and prosperity, with the struggle to maintain and give to his family the benefits which come from it, finds his burden of taxation increased. The poll tax, which the Constitution tells him in no uncertain language "shall never exceed $2," has in many counties reached more than double this amount. We were told on the argument, by counsel well informed and representing the defendant board of commissioners, who have opportunity for knowing of such matters, that this tax on the heads of families, wage-earners, has become burdensome and oppressive. It is well calculated to retard immigration into our State of desirable citizens, especially when the amount which they may be called upon to pay for the privilege of coming is uncertain and constantly increasing. Looking to the Constitutions of other States, we find that they provide for a specific poll tax, uniform in amount and application. In two States, Maryland and Ohio, the Constitution prohibits the levy of any poll tax. In Virginia it is limited to $1.50, and in South Carolina, Georgia, Florida and other States to $1. In none of the States, other than California and Oklahoma, is it as much as

$2. In a number of the States no reference is made to a poll tax. In all of the States wherein it is levied the amount is fixed, uniform, and applied to public education. Judge Cooley says that "capitation taxes are not a common resort in modern times, and only in a few cases could they be just or politic." 1 Taxation, 28. Without further discussing the subject, we are brought to the conclusion that the act of 1905, ch. 840, is in accordance with the correct interpretation of the Constitution; that the last clause in section 1, Article V, "and the State and county capitation tax combined shall never exceed $2 on the head," is imperative and prohibits the levy of any tax upon the poll for any purpose in excess of that sum; that section 2 applies the poll tax to the purposes of education and the support of the poor, and that this language withdraws it for any other purpose. We are not inadvertent to the fact that this conclusion in this last respect is not in harmony with what was said in *Board of Education v. Board of Commissioners,* 137 N. C., 310. As we have said, in that case the tax had been collected, and the only question was which of two contradictory provisions should control. Under the construction which we give Article V, the question cannot again arise. The plaintiff raises the question that the poll tax directed to be levied for the payment of the railroad bonds enters into the contract and its repeal violates the obligation thereof. The plaintiff has no such relation to the bonds, so far as this record discloses, as entitles it to raise the question. It has no contract rights to be affected. We decide that the Commissioners of Mecklenburg acted in accordance with the statute in failing to levy more than $2 on the poll, and that the statute is a valid exercise of power by the Legislature. This conclusion renders it unnecessary to discuss the much-vexed question as to what is or is not a special purpose, within the meaning of section 6, Article V. The plaintiff alleges that the defendant board of commissioners has levied 15 cents on the $100 valuation of real and personal property for the pur-

pose of paying the interest on the bonds referred to in the complaint, amounting to $300,000; that the total valuation of real and personal property in Mecklenburg County amounts to $22,429,697; that the levy of 15 cents yields $33,644.53, whereas the amount necessary to pay the interest is only $18,000; that no sinking fund is being created to pay the principal of said bonds; that it is informed and believes that the excess over the amount necessary to pay said interest is used by defendant board of commissioners for the general county expenses. Defendant admits that the total value of property is as alleged; that the other allegations in respect to this cause of action are admitted "for the purpose of this action alone." For further defense they say that at the time the levy of 15 cents was made, on the first day of June, 1907, the said board of commissioners did not and could not know that the total valuation of the taxable property in said county would reach the sum named; that when they made the levy they did not expect that it would yield so large an amount, but "expected and intended to apply any excess to defraying the ordinary expenses of the county, as had theretofore been done"; that as practically all of the other taxpayers in the county had paid their taxes pursuant to said levy, it would be inequitable to enjoin the collection from plaintiff of the amount due. It is not claimed that the commissioners exceeded any statutory limit in levying 15 cents on the $100 valuation of property to pay said interest, but that they did not wisely exercise their discretion. It seems that the increase in the value of property in the county over that of 1903 was $2,781,000. The court finds the facts in regard to this matter as above set forth. It cannot be said that the levy was invalid so that the court can, consistently with the discretion vested in the commissioners, enjoin its collection or undertake to revise its action. It is not clear that if before the large part, or, as said, "nearly all of the taxpayers" had paid it, the plaintiff or any other taxpayer had applied for a *man-*

damus commanding the commissioners to revise their action, in the light of the increased valuation of the property, the court would not have granted appropriate relief. We do not concur with the suggestion that the commissioners have the power to levy and collect a tax for a specific purpose and apply any part of it to another purpose. This would be in violation of the express prohibition of section 7, Article V of the Constitution. While we cannot sustain his Honor's judgment enjoining the entire levy, we are of the opinion that plaintiff, if so advised, is entitled to an order enjoining the appropriation of any part of the excess over the interest on the bonds to any other purpose. It may be held to meet the interest accruing for the coming year or for a sinking fund, as the provision of the act under which the bonds were issued may provide. No more should be taken from the citizen, either natural or corporate, by way of taxation than is reasonably necessary, and what is taken must be applied to the purpose for which it is so taken, and "no other." When these well-defined limits are disregarded, taxes become oppressive. The increase in wealth and in valuation should result in decrease in the rate of taxation; otherwise we will have neither. The courts should not and will not interfere in the administration of the internal domestic affairs of the counties and cities unless there is a manifest disregard or abuse of power or discretion. Doubtless the custom has prevailed of supplementing one necessity by resorting to some other resource, without any purpose to violate the law. A man may do this in his private business, but it is not permissible in the administration of public business. Each fund, its resources and its disbursements, should be kept separate. The cause will remain on the docket for final judgment, when the plaintiff may move for such orders in this regard as it may be advised. The order continuing the injunction was erroneous and must be

Reversed.

SOUTHERN RAILWAY COMPANY v. BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY.

(Filed 25 May, 1908.)

Taxation—No Direction of Levy of Poll Tax—No Repealing Statute.

The only difference between the facts found in this case and those in the case immediately preceding being that the statute in this case does not in express terms direct that a poll tax be levied, and that there is no repealing act directing the levy of a poll tax or the levying of such tax beyond the sum of $2: *Held*, the digest in that case is fully applicable to this one on all points.

ACTION heard before *Moore, J.*, by consent, at chambers in Asheville, 24 March, 1908, from MECKLENBURG.

Defendant appealed.

W. B. Rodman and *A. B. Andrews, Jr.*, for plaintiff.

C. A. Webb for defendant.

CONNOR, J. This action is in many essential respects similar to the case of the same plaintiff against the Commissioners of Mecklenburg County. His Honor found the following facts: Plaintiff owns property in Buncombe County valued for taxation at the sum of $1,458,353. At their meeting in June, 1907, the defendant commissioners levied upon each $100 valuation of property in said county the following taxes:

For State	.21
For pensions	.04
For schools	.18
For county, general purposes	.23⅔
	.66⅔
That at the same time they levied on each taxable poll	$2.00

That at the same time they levied on each $100 in valuation on property:

Bridges and roads (Acts 1905, ch. 411, section 2)	.15
Interest and sinking fund (Acts 1901, ch. 598; Acts 1905, ch. 751; Acts 1893, ch. 172)	.18⅓
	33⅓

They levied no other or further tax on the poll than the $2.

The county of Buncombe, pursuant to various acts of the General Assembly, has issued and has now outstanding:

$50,000 courthouse bonds	5	per cent.
50,000 funding bonds	5	"
20,000 county home bonds	4½	"
98,000 funding bonds	5	"

For the purpose of paying the annual interest upon and retiring at maturity the said bonds the sum of $27,299 should be levied. The levy of 18⅓ cents, levied for that purpose, without any tax on the polls, will yield $35,235.37. There are other bonds outstanding amounting to $60,000, the interest and principal at maturity of which are provided for out of the levy for general purposes.

The commissioners have not laid aside any sinking fund out of levies heretofore made, but the taxes amount to much more than the interest, levied pursuant to the several acts authorizing the levies, after paying the annual interest upon the bonds, for the purpose of paying the ordinary expenses of the county. It is the intention of the said board, out of the levy for the year 1907, to lay aside the excess, after paying the interest, to create a sinking fund. Several of the acts pursuant to which the levy is made provide for a levy on the poll of a tax corresponding to the tax on the property. Several of them do not. The defendant board of commissioners, at the time of levying said taxes, were advised and

believed that they had no right, under the Constitution, Art. V, sec. 1, and all the acts mentioned in the complaint, to a capitation tax in excess of $2.

His Honor, being of the opinion that the levy of the several taxes set out on the property, without the levy of a corresponding tax upon taxable polls, in Buncombe County, was illegal and void, and that the taxes charged to the plaintiff are for that reason illegal, made an order continuing the injunction to the hearing. Defendant board of commissioners appealed. The only difference between the facts found by his Honor in this case, other than amounts, etc., consists in the fact that the act of 1893, ch. 172, pursuant to which the issue of $98,000 5 per cent. "funding bonds" were issued, does not in express terms direct that a poll tax be levied. The other acts do so direct. There is no statute repealing any of the provisions of said acts directing the levy of a poll tax or prohibiting the levy of such tax beyond the sum of $2, as in the Mecklenburg case. The two cases were argued together, and, except in the particulars named, it is conceded there is no substantial difference between them. The question, therefore, upon which the plaintiff's right to maintain its action depends is whether section 1, Article V, makes it imperative upon the Legislature to impose a poll tax in excess of $2, when a property tax in excess of the same amount is levied upon property for any and all purposes, or whether the words "that the State and county capitation tax combined shall never exceed $2 on the head" prohibit a poll tax in excess of that sum for any purpose. We have given the subject our best thought and investigation in the Mecklenburg case, and reached the conclusion therein announced. We note that in defendant's answer it is alleged that the city of Asheville levies a tax on the poll of $4.50, thus making the poll tax on each citizen liable therefor in said city $6.50, or, as contended by plaintiff, $7.50. This is significant of the operation of the Constitution, when the imperative command that the capitation tax shall never ex-

ceed $2 on the head is disregarded. We also note that his Honor finds that the defendant is levying for the payment of interest on the bonds an amount in excess thereof and applying it to general expenses. This cannot be permitted. One of the beneficent effects of increase in wealth and in valuation for taxation should be the lowering of the rate. Any taxation beyond the reasonable necessity or for any other purpose than that for which it is levied is oppression. We have indicated in the opinion in the Mecklenburg case the proper course to be pursued in this respect. The order of his Honor continuing the injunction must be

Reversed.

CLARK, C. J., concurring: The constitutional limitation upon taxation is 66⅔ cents on the $100 for State and county purposes. Its application has often been thus summarized by this Court:

(*a*) For necessary expenses the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

(*b*) For necessary expenses the county commissioners may exceed the constitutional limitation by special legislative authority without a vote of the people. Cons., Art. V, sec. 6.

(*c*) For other purposes than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. Cons., Art. VII, sec. 7.

The above summary is to be found in *Tate v. Commissioners,* 122 N. C., 815; *Herring v. Dixon, ib.,* 424; *Smathers v. Commissioners,* 125 N. C., 488; *Cotton Mills v. Waxhaw,* 130 N. C., 298.

As to the *equation* of taxation: The Constitution, Art. V, sec. 1, provides that the General Assembly shall levy a capitation tax on every male inhabitant over twenty-one and under fifty years of age "which shall be equal to the tax on property valued at $300 in cash," but couples it immediately with this

restriction, in the same section: "The State and county capitation tax combined shall *never* exceed $2 on the head." Section 2 provides that the State and county capitation tax shall be applied to education and the poor—not more than one-fourth thereof to the latter.

Section 6 of the same article of the Constitution provides that county taxes "shall be levied in like manner with the State taxes, and shall never exceed double the State tax," with the exception, "except for a special purpose and with the special approval of the General Assembly." But for the use of the words *"in like manner,"* no one could contend that the equation applied to county taxes at all, or, indeed, that the counties are required to levy a poll tax under any circumstances to any amount. As those words refer us back to section 1 of Article V, so the exception applies both to "in like manner" (the equation) and to exceeding "double the State tax"; *i. e.*, when taxes are levied "for a special purpose and with the special approval of the General Assembly," both the equation and the prohibition upon the county to exceed double the State tax are to be disregarded. That the equation does not apply when the constitutional limitation is exceeded by legislative authority, the very point now presented, was discussed and was clearly held by *Merrimon, C. J.*, in *Jones v. Commissioners*, 107 N. C., 248, and it is cited for that ruling, 27 A. & E. Enc. (2 Ed.), 634.

The language of the Constitution, "The State and county capitation shall *never* exceed $2 on the head," is imperative and uncompromising. There is no exception to this anywhere. The people so understood it when they adopted the constitutional amendment in 1900 requiring the payment of poll tax as a requisite to suffrage.

The poll tax has never been favored by economists. Judge Cooley (Taxation, 28) says: "They are not a common resort in modern times, and only in a few cases could they be either just or politic." The universal poll tax laid under the later

Roman Empire is said by Hume to have been one of the chief causes of its decay and final overthrow. Wells Taxation, 331. A poll tax was first levied in England in 1377 and was the cause of the famous Rebellion of Wat Tyler in 1381. Afterwards it was made a graduated tax, graded according to the amount of property and rank of each person, and bachelors and widowers being specially taxed. But even as a graduated tax the poll tax was last enacted in England in 1689 and was finally repealed in 1698, more than two centuries ago, and "henceforth this form of tax passed into the list of taxes tried and never again to be imposed in England. What minister," said Henry Fox, in 1748, "would presume again to suggest the hated hearth money of the Stuarts or the poll taxes of the reign of William III. ?"

In this country there is, as in England, no poll tax levied by the State in Connecticut, Delaware, Florida, Illinois, Iowa, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Wyoming and Utah—twenty-two States—though in some of these there is a small poll tax laid by local authorities in aid of schools or roads.

In Alabama, Arizona, Arkansas, California, Georgia, Indiana, Louisiana, Mississippi, Texas, Virginia and West Virginia the poll tax is by the Constitution appropriated to the public schools, and in most of them it does not exceed $1.

In all our neighbor States, Georgia, South Carolina, Tennessee, Virginia and West Virginia, the poll tax is limited by the Constitution to $1, as is also the case in Arkansas and Colorado.

Without going further into the details as to the other States, none of them present the condition of many of our towns, in some of which the State, county and municipal poll tax combined have reached the oppressive figure of $6, $7 and even $8. This is criticised by Hollander on State Taxation, 104,

who points out that in this State, in which 60 per cent. of the taxes are paid by persons owning less than $500, the result is that the small taxpayer, if he pays a poll tax also, pays nearly double the rate of the larger taxpayers.

Up to about 1850 the poll tax raised about half the State taxes in North Carolina. In 1827, for instance, when the entire taxes collected for our simple State government of that day were less than $60,000, more revenue was raised from polls than from property, the tax on lands and town lots yielding $25,948.41, while the poll tax brought in $27,948.41. The poll tax was largely paid on slaves, which property paid no other tax. In those times there were no insane asylums, public schools, schools for deaf and dumb and blind, nor interest on public debt, and other matters now requiring public expenditures. When the insane asylum was established a part of the poll tax was appropriated to that purpose.

With the development of the State and the increased demand for revenue to defray the cost of schools, public institutions and the like, it was seen that the taxation on polls might become excessive. The history of taxation in this State, the fact that a large part of the State revenues had been previously raised by the poll tax, the growing necessity for still greater revenues, which might make the poll tax oppressive unless restricted, the abandonment altogether of any poll tax in England and in many of our sister States and its restriction in others — all these combine to show why it was that the Convention of 1868 provided that "The State and county capitation tax combined shall never exceed $2 on the head." *Never*—that is to say, "under no circumstances and at no time" shall it exceed that sum.

This does not in any wise affect the holders of bonds issued under acts providing for a poll tax in equation with the property tax, for they took the bonds with a notice in the Constitution (Art. V, sec. 2): "The proceeds of the State and county capitation tax shall be applied to the purposes of education

and the support of the poor." If, therefore, the poll tax were collected under those acts, the proceeds would go to those purposes only, and if eliminated (where above $2) there is no diminution of the fund applicable to payment of the principal or interest of the bonds.

It is peculiarly inappropriate for the plaintiff to institute this action to compel the payment of a head tax in excess of the $2 per head by the citizens of Buncombe, seeing that, as appears by the record in this case, the taxes collected out of the property in that county to pay the interest on the bonds practically donated to aid in building the railroad owned by the plaintiff amount to about as much as the entire taxes paid by the plaintiff, thus making all the great property of the plaintiff in that county a noncontributor to the expenses of government and the cost of protecting and safeguarding its property.

W. R. HOLLOWELL v. E. B. BORDEN ET AL., TRUSTEES OF THE GOLDSBORO GRADED SCHOOLS.

(Filed 29 May, 1908.)

1. **Municipal Corporations—School Districts—Constitutional Law.**
   A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of Article VII, section 7, of the State Constitution.

2. **Same—Debts Contracted—Public Schools—Special Purpose—Vote of the People.**
   The expense of a public-school system of a town is not a necessary municipal expense, and a bond issue to pay a debt contracted for that purpose, to be constitutional, must be submitted to a vote of the qualified voters of the township. Laws 1905, ch. 533, sec. 14. (*Collie v. Commissioners,* 145 N. C., 170, cited and distinguished.)

ACTION heard before *W. R. Allen, J.,* at chambers, from WAYNE.

This action is brought by the plaintiff on behalf of himself and other taxpayers of Goldsboro Township for the purpose

of restraining the defendants from issuing bonds. Upon the hearing the injunction was refused, and plaintiff appealed.

The facts are stated in the opinion of the Court.

F. A. Daniels for plaintiff.

A. C. Davis for defendants.

BROWN, J. At the special session of the General Assembly of 1908 an act was passed (chapter 31, Private Acts) empowering "the trustees of the Goldsboro Graded Schools to borrow the sum of $30,000 to pay for a site and for building a school building for the Wayne County High School, to be run in connection with the Goldsboro Graded Schools, and to issue therefor bonds of the denomination of $100 each." etc.

In pursuance of this act the defendants have undertaken to issue $20,000 in bonds of the denomination of $1,000 each.

The objection made to the validity of the act and of the bonds issued in pursuance thereof is that no election is provided for, and that none has been held, submitting this bond issue to the qualified voters of Goldsboro Township.

We think the objection is well taken and that his Honor should have granted the injunction.

It is properly admitted in the brief of the learned counsel for defendants, as well as that of the plaintiff, that the Board of Trustees of the Goldsboro Graded Schools of Goldsboro Township is a municipal corporation within the meaning and purport of Article VII of the Constitution of this State.

We have held that, "under a statute authorizing municipal corporations to issue bonds, a school district is properly called a municipal corporation, according to the modern use of the term, and as such may obligate itself by bonds issued under such a statute." *Smith v. School Trustees,* 141 N. C., 151.

The same case classifies school districts as being among those municipal corporations that come within the scope of section 7, Article VII, prohibiting the contracting of debts without submitting the question to the qualified voters.

It is contended that no special tax is necessary to pay these bonds or the interest on them. That is immaterial. The contracting of the debt, as well as the levying of the tax, is prohibited unless authorized by the votes of the qualified electors.

It is also contended that the bonds are to be used in building a school building, a necessary municipal expense.

It has never been held anywhere, so far as we know, that the expense of the public-school system of this or any other State is a necessary *municipal* expense.

Our common-school system is created in the Constitution and subject to its provisions; the care and control of it are left to the wisdom of the General Assembly. That body has empowered numerous municipalities to issue bonds and to tax themselves by special taxation so as to enlarge the common-school facilities provided for them by the general law of the State. But all such measures are required to be submitted to the qualified voters for approval. The policy of the State in reference to the establishment of high schools is set forth in section 14, chapter 533, Laws 1905, which expressly provides that where the public funds are sufficient for the establishment of a high school the same may be established without levying a special tax, but that where the funds are insufficient for that purpose an election shall be held, and if a majority of the qualified voters vote in favor of said tax, then the same shall be imposed. This act is general in its nature and relates to the public schools of the State. The policy of the State with reference to the establishment of high schools is further seen from the provisions of chapter 820, Public Laws 1907, in which provision is made for State aid in the establishment of the same. There is nothing in the recent decision of the Court in *Collie v. Commissioners*, 145 N. C., 170, which sustains the idea that our public-school system is a necessary municipal expense. On the contrary, the opinion regards the public-school system as a State insti-

tution, founded in the Constitution and governed and controlled by the General Assembly. In order to reconcile clauses of the Constitution apparently conflicting, we held in that case that the provision for four months school terms was mandatory, and that in order to give effect to it the General Assembly could compel the counties of the State, when necessary, to disregard the limitation upon taxation contained in Article V, section 1.

The question presented here was decided adversely to the contentions of the defendant in *Smith v. Trustees, supra,* where it is held that the establishment of a school district with power to issue bonds for school purposes must be sanctioned by a vote of the qualified voters of the prescribed territory. 141 N. C., 152. And in the recent case of *Wharton v. Greensboro,* 146 N. C., 356, one of the questions before the Court related to the validity of $30,000 in bonds issued for the special purpose of "equipping, altering and furnishing a school building or buildings for the city." The bonds issued had been ratified at the polls by a majority of the qualified voters, but it was contended that they were not to be used for necessary municipal expenses, but for a special purpose, and came within the limitation prescribed for such municipal indebtedness by section 2977 of the Revisal.

This Court unanimously held that the issuing of the $30,000 of schoolhouse bonds was "admittedly not a necessary expense," but constituted an indebtedness contracted for a special purpose. In the view we take of the case, it is unnecessary to consider the other objections to the validity of the bonds.

The judgment of the court below is reversed and the cause is remanded, with directions to issue the injunction as prayed for.

Reversed.

L. O. MARTIN v. SEABOARD AIR LINE RAILWAY COMPANY AND CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 29 May, 1908.)

1. Pleadings—Joint Cause Alleged—Consolidation.

It was not error in the lower court to consolidate two suits brought by the plaintiff against two distinct railway companies, when the injury complained of is alleged in the complaint to have arisen from the failure of each defendant to adopt, promulgate and enforce together a reasonably safe system and rules regulating the approach of their engines and cars at a crossing of their tracks for the protection of their passengers thereat, thus rendering the condition of the passengers extra hazardous.

2. Same—Negligence—Defenses—Proximate Cause—Single Liability.

When each of the complaints in two separate suits against two distinct corporations alleges a joint cause of action upon the question of negligence as to both, it is no valid objection, under our Code practice, to an order consolidating them that either the one or the other defendant may be found solely liable on the trial, owing to some act or omission to act being the proximate cause of the injury.

3. Same—Issues.

In an action for damages alleged to have arisen from the joint negligence of two defendant railroad companies, caused by a collision at a crossing of their tracks, where either one or the other may or may not be held liable under the doctrine of proximate cause, the court should submit appropriate issues directed to the several phases of the pleadings, and for greater certainty may in his discretion submit other pertinent questions to the jury as allowed by the statute.

ORDER consolidating two causes, made by *Moore, J.*, at March Term, 1908, of MECKLENBURG.

The plaintiff sued defendant companies for damages sustained by a collision had between the engine of the railway company and the car of the Charlotte Electric Railway and Power Company at a point in the city of Charlotte at the intersection of North Brevard Street, alleging negligence in several respects. Plaintiff also sued the electric and power company for damages sustained at the same time and in the same collision, alleging negligence on the part of said defend-

ant in several respects. Among other grounds of liability plaintiff urged in his complaint against the power company that the defendant negligently failed to adopt, promulgate and enforce a reasonably safe system and rules for the operation of its cars at crossings with other railroads, particularly the Seaboard Air Line Railway Company, and by reason thereof the said crossing was rendered extra hazardous; that the defendant failed to have any agreement with the Seaboard Air Line Railway Company as to their cars crossing the crossing when they arrived there at the same time or about the same time, and had no rule with each other as to which car or cars on the different tracks at the said crossing should have precedence; that the defendant negligently failed to adopt, promulgate and enforce a reasonably safe system as to the speed of its cars just prior to reaching the said crossing, and negligently allowed and permitted and required its motormen to run its said cars at or about the said crossing in such a manner as to make it extra hazardous in the operation of the said cars thereat. The same allegations were made in the complaint against the railway company, varying the names of the defendants as applicable to each case. His Honor, upon motion of plaintiff, ordered a consolidation of the cases. Defendant Seaboard Air Line Railway Company excepted and appealed.

Brevard Nixon, J. D. McCall and *J. F. Newell* for plaintiff.

J. D. Shaw and *Stewart & McRae* for defendants.

CONNOR, J., after stating the facts: While it must be conceded that a number of alleged negligent acts and omissions are made against each defendant, for which the other is in nowise responsible, the collision resulting in the injury—that is, the impact—was caused by the engine and street car coming together at the crossing. The plaintiff alleges, among other omissions of duty, the failure of the two corporations

to establish and maintain rules regulating their conduct in approaching the crossing. This duty, if any existed, was joint. One party could not establish joint rules without the assent of the other. If, as alleged, and for the purpose of this motion taken to be true, a joint duty was imposed upon defendants, and they failed to discharge such duty, they would each be guilty of negligence, and if such negligence was the proximate cause of the collision they would both be liable. If, on the contrary, there was a common breach of duty, and, notwithstanding such breach, the conduct of one, either by positive action or omission to act at and before the collision, was the proximate cause of the injury, the other might be acquitted of liability. These and many other questions discussed in the briefs are interesting and not easy of solution. We deem it unwise to discuss them at this time. They may or may not arise upon the verdict. It is always best to avoid discussing questions not presented by the verdict of the jury, found by a referee or admitted by demurrer. It is urged, and probably will be found true upon the trial, that it will be difficult to form issues or give instructions to the jury presenting clearly each and every phase of the litigation. This is one of the objections to the Code system of procedure, but it has many compensating advantages over the common-law systems in which the jury could find only a general verdict. Issues may, by a judge with learning and experience, aided by counsel equally so, be so drawn that all controverted questions of fact will be presented and settled, enabling the court to declare the law and the relative rights and liabilities of the parties. We do not think that a demurrer could be sustained if the plaintiff had sued the defendants jointly. It is held that, in an action for personal injuries, the corporation may be joined with its employee. It may be and frequently is the case that the allegations include negligence of the former in regard to defects of the machinery, and the latter in regard to the manner in which it is operated. In

such cases the court submits issues directed to the several phases of the pleadings, and for greater certainty may in its discretion submit questions to the jury. Clark's Code, 390; *Quarles v. Jenkins,* 98 N. C., 258. Without intimating any opinion in regard to the merits of the controversy or the liability of either of the defendants, we are of the opinion that there is no error in the order of consolidation. The fact that one of the defendants had not answered is immaterial. The order is based upon the allegations in the complaints. There is

No Error.

G. H. CHURCH v. CLARA K. DULA ET AL.

(Filed 29 May, 1908.)

Cities and Towns—Streets—Dedication—Revocation—Description—Evidence—Nonsuit.

C. was the owner of two certain town lots abutting on A. Street, numbers 37 and 38, from whom plaintiff claims under *mesne* conveyances. A. Street had been laid off and designated on a map of the town, but had never been used for street purposes. C., prior to conveying the lots, obtained a quitclaim deed from the town to A. Street under legislative authority, which subsequently came by *mesne* conveyances to defendants. In making the deed to the two lots under which plaintiff claims, the following calls were given: to "a stake, the old S. West corner of lot 37, on the edge of old A. Street; thence with the line of lot 37," etc.: *Held,* (1) that the deed of A. Street to C. from the town was valid and effective, and, though there was evidence of a prior dedication of that street, the deed from the town amounted to a revocation by mutual consent; (2) that the calls in the deed under which plaintiff claims were meant for description only; (3) that the motion for judgment as of nonsuit upon the evidence should have been granted. (*Southport v. Stanly,* 125 N. C., cited and distinguished.)

ACTION to recover damages for maintenance of a public nuisance, causing special damages to plaintiff, tried before *Ward, J.*, and a jury, at November Term, 1907, of CALDWELL.

Issues were submitted as follows:

1. "Is the plaintiff the owner of the lands described as lots Nos. 37 and 38, mentioned in the complaint?" Answer: "Yes."

2. "Does lot No. 37 abut on Ashe Street?" Answer: "Yes."

3. "Has the plaintiff the right to have said street opened?" Answer: "Yes."

4. "Have the defendants the right to place said house in the street called Ashe Street, in front of lot No. 37?" Answer: "No."

At the close of the testimony his Honor charged the jury, if they believed the evidence, they would answer the first three issues "Yes" and the fourth "No."

Verdict and judgment for plaintiff, and defendants excepted and appealed.

Mark Squires and *Lawrence Wakefield* for plaintiff.

W. C. Newland and *M. N. Harshaw* for defendants.

HOKE, J., after stating the facts: The evidence tended to show that, in 1841, under and pursuant to an act of the Legislature, certain lands, including that now in controversy, were conveyed to Edmond Jones, Chairman of the County Court, for the purpose of laying out a town, to be called Lenoir, where the public buildings of the county of Caldwell should be erected and the public offices of the county should be kept; that the sites for public buildings having been selected, the lands were laid off into streets and lots, and a map thereof made and filed in the office of the Register of Deeds of Caldwell County, where it has since remained. From said map it appears that one of these streets was laid off and designated as Ashe Street, and that two lots, known as lots Nos. 37 and 38, appear on said map as abutting on said street; that these lots, with others, were sold by commissioners to purchasers, and Nos. 37 and 38 were purchased by

James Harper and conveyed to him and his heirs, and passed by *mesne* conveyances to one S. M. Clark on 3 February, 1874; and on 20 November, 1875, said Clark conveyed a portion of these lots to one J. C. Blair, and in this deed the part so conveyed was described as running to a point on Ashe Street, thence with the line of lot No. 37 and Ashe Street N. 61° E. 10 poles and 13 links to the beginning; and the land so sold and conveyed by Clark has passed by *mesne* conveyances to plaintiff, plaintiff's deed bearing date 30 December, 1901.

There was further evidence to show that, while these lots appear in the plat as abutting on Ashe Street and in the deeds the boundaries call for said street, as a matter of fact this was in name only, and neither at this point nor beyond, nor at any place, so far as this record discloses, had it ever been used as a street of the town or by any inhabitant owning or occupying property abutting thereon. It further appeared that, while said Clark owned these two lots, Nos. 37 and 38, and before conveying any portion of same to J. C. Blair, he had bought and taken a quitclaim deed from the town of Lenoir for this land, appearing on the map as Ashe Street, and that this said deed had been made by authority of an act of the Legislature, as recited and referred to in the deed (chapter 124, Laws 1869-'70, and chapter 58, Private Laws 1873-'74). This last-mentioned act gave express authority to the Commissioners of Lenoir to sell "all the land laid off as streets in the map of said town which is not now used as streets," etc.; that subsequently Clark sold and conveyed the land covering the old Ashe Street to C. V. Henkle, and same passed by *mesne* conveyances to A. A. Dula, the deed to Dula bearing date 9 November, 1900; that prior to the commencement of this action said Dula died intestate, and defendants are his widow and heirs at law, the last-mentioned defendants being minors; that the house occupied by defend-

ants under the deed to A. A. Dula is on the land formerly known as Ashe Street.

Upon this statement, which contains the material facts as we are enabled to gather them from the record, we are of opinion that the motion to dismiss the action as on judgment of nonsuit should have been allowed by the court. It is true that in the well-considered case of *Moose v. Carson,* 104 N. C., 431, this Court has held that, where a "municipal corporation conveys land bounded by established streets and alleys, and the grantee enters upon and improves it, a subsequent conveyance by the corporation of the land covered by such street or alley, whereby the easement of the appurtenant owner is interfered with, is void," citing *Sarpy v. Municipality,* 62 Amer. Dec., 221; 9 Lou. Ann., p. 597; *Port Hudson v. Chadwick,* 52 Mich., 320; *Harrington v. Augusta Factory,* 73 Ga., 447. But the facts presented here, as we apprehend them, do not bring plaintiff's demand within the principle of that decision.

Not only had there been no improvement made with reference to the alleged street, but the evidence is to the effect that Ashe Street had never been used as a public way; and not only so, but, pursuant to an act of the Legislature conferring special authority on the town of Lenoir to sell all streets which had not been in use by the town, the street in question had been sold and conveyed to S. M. Clark, the common grantor from whence both the titles of plaintiff and defendants were derived. The case states that, in September, 1874, while Clark held the title of lots Nos. 37 and 38, he bought and took a deed for Ashe Street from the commissioners of the town, and it does not appear that at that time any other citizen or abutting owner had any right or special interest in the use of this street. The commissioners of the town, having succeeded to the authority and title of the old County Courts, so far as the public streets of the town were concerned, and acting under an act of the Legislature conferring special au-

thority for the purpose, had a right to convey the street, and S. M. Clark, as owner of lots Nos. 37 and 38, had a right to buy it. And if it should be conceded that there had been a dedication of Ashe Street—and there was certainly testimony tending to establish such dedication—this sale and conveyance to Clark amounted to a revocation by mutual consent, and the land, which may have formerly been a public way, thereby became private property; and we do not think the description given in the deed by which Clark sold and conveyed to J. C. Blair the portion of the land now owned by plaintiff has or was intended to have the effect of a rededication. Clark then held the street as his private property, and this fact and the attendant circumstances were all known or could have been easily ascertained, and the call in Blair's deed to "a stake, the old S. West corner of lot 37, on the edge of old Ashe Street, thence with the line of lot 37 and Ashe Street N. 61 E. 10 poles and 13 links," was only meant for description. The term "old Ashe Street" gives additional indication that there was no intent to rededicate. The street had become and was then the private property of Clark, and, having passed, as stated, by *mesne* conveyances to defendants, their occupation of the land formerly covered by the street is rightful, and no action against them on the ground suggested can be sustained.

This view is not affected in any way by the case of *Southport v. Stanly,* 125 N. C., 464, to which we were referred by plaintiff's counsel. That decision was to the effect that the general power conferred on the authorities of a town to sell and dispose of town property by section 3824 of The Code of 1883 (Revisal, sec. 2978) does not give the right to sell property held in trust for the public; for any such purpose there must be an act of the Legislature conferring special power. As we have seen, the commissioners of the town had this special power conferred upon them by Private Acts 1873-'74,

ch. 58, *supra*, and there is nothing appearing in the record to destroy or impair the title conveyed by their deed.

There is error, and this will be certified, to the end that the action be dismissed.

Reversed.

F. P. TATE ET AL. v. ABE JOHNSON ET AL.

(Filed 30 May, 1908.)

1. **Deeds and Conveyances—Boundaries—Description—Stake.**

A stake is not a natural boundary in the description of a conveyance of land.

2. **Deeds and Conveyances—Boundaries—Evidence.**

When a call in a deed is for a line running at a certain distance from an ascertained corner to a stake, and the further description of the line is not met, the stake and distance do not control, as a matter of law, when it appears that a survey had been caused to be made of this and an adjoining tract on the same day by the owner of both tracts, including the dividing line in dispute, and this dividing line is identical as to calls, courses and distances in both deeds under which the parties claim. Under such circumstances it is for the jury to find the true location of the disputed line.

3. **Same—Instructions.**

When the boundary line between two lots of land lying east and west of each other is in dispute, and the owner had a plat of them made on the same day, in which the western one was numbered "one" and the eastern one numbered "two," and a subsequent conveyance was made by him of yet another lot, the deed to which was put in evidence for the purpose of establishing the southeast corner of lot numbered one, described as "lying south of the first, beginning at a yew pine, southeast corner of said survey, running west with said line 90 chains to a stake," it was error in the court to charge the jury in effect that the third lot lay south of the first and establish the corner thereof at a certain place at which there was no yew pine, it further appearing that by running the distance of 90 chains from the southeast corner of lot No. 2 it would include its southern boundary and fit in with the further calls in the deed.

4. Deeds and Conveyances—Adverse Possession—Color—Instructions—Descriptions.

When, for the purpose of establishing a dividing line between adjoining owners of land derived from a common source holding a grant from the State, a deed is introduced to show title to the disputed land under "color" and adverse possession, with full description, it was error in the court below to instruct the jury that the description in the deed must be followed, when the deed recites that the tracts were those originally granted by the State to the common grantor. 1. It was competent for the jury to have the description in the grant to aid them in locating the corners and lines of the deeds. 2. If there was a discrepancy upon the evidence the jury should reconcile it, or they may find the more reliable description to be in the grants. 3. If upon the whole evidence the descriptions of the deeds are found to be irreconcilable with those of the grants, those in the deeds would control.

ACTION tried before *Peebles, J.*, and a jury, at September Term, 1907, of MCDOWELL.

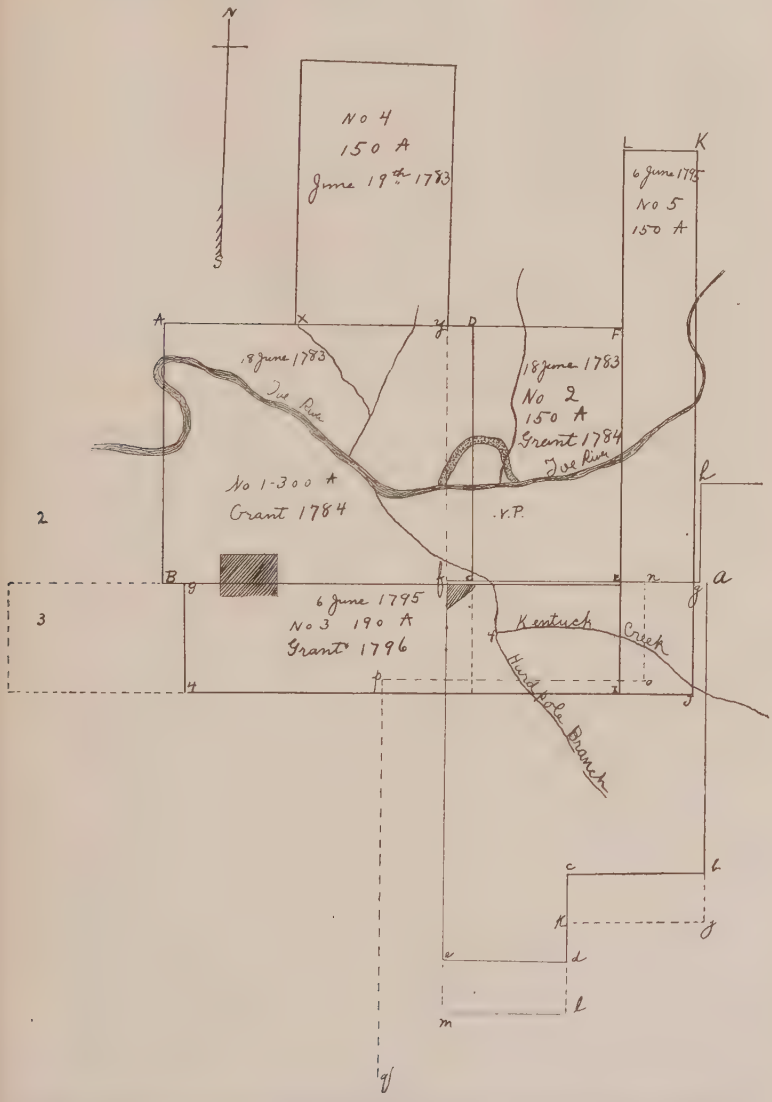
Plaintiffs appealed.

S. J. Ervin and *Avery & Avery* for plaintiffs.

Pless & Winborne for defendants.

CONNOR, J. Plaintiffs sue for trespass upon certain lands, a description of which is fully set forth in the record. The merits of the controversy depend very largely upon locating the several tracts as described in the original grants from the State to Waitstill Avery. The plat accompanying the statement of the case shows the contentions of the parties. For the purpose of showing title the plaintiffs introduced certain grants to Avery, bearing date 9 November, 1784, based upon surveys made 18 June, 1783. It is conceded that the beginning of lot No. 1 is at A. The next call is 5 chains to the creek, crossing the same course 45 chains to a chestnut on the Rich Mountain, B. (This line must be extended 4¾ chains to reach B.) The next call is 60 chains E., crossing a branch to a stake in Laurel Swamp. The distance in this call gives out at red *f*, which defendants insist is the southeast corner. Plaintiffs insist that this line should be extended 4 chains to

C. The reason upon which this contention is based appears by reference to the next call, "north 32 chains, crossing the



river, the same course 18 chains to a Spanish oak," D; thence to the beginning.

Plaintiffs next introduced a grant to Avery, surveyed 18 June, 1783, dated 9 November, 1784. This grant calls for the beginning at a Spanish oak, the northeast corner of the first tract, running south 18 chains to the river, crossing same course 32 chains to a stake, C; thence east. The controversy in regard to the location of the first tract centers upon the eastern terminus of the second line. Defendants insist that it should be controlled by course and distance, stopping at red *f* and following the dotted line to *y*. Plaintiffs contend that, disregarding distance, it should be extended 4 chains to C. In support of this contention they call attention to the fact that a line running north from red *f* will not cross the creek 32 chains from the river or 18 chains from it either to the Spanish oak or *y*. They also call attention to the call of grant No. 2, 150 acres, for which the survey was made for Mr. Avery on the same day, which calls for a Spanish oak, the northeast corner of the first tract, and describes the line as running S. 18 chains and crossing the creek in the same course 32 chains to a stake.

T. L. Bandy swore that he surveyed lot No. 2, and says that in running the line he began at A and ran east to D, and found an old marked line from A to D. The distance gave out 16 poles west of D, which is an old field cleared up. He located D by starting at a branch just east of D called for in the 150-acre tract (No. 4). From D he ran a line south 18 chains and got to the old channel of Toe River, where Toe River formerly ran. This old channel is marked red on the map and is north of where the river now runs. From this red channel to D is just 18 chains, and he then ran the same course south of the channel 32 chains, being 50 chains south of D. Plaintiffs insist that this, with other evidence, tended to show that the east line of lot No. 1 is the same as the west line of lot No. 2; that by locating the line of lot No. 2 at D, south 18 chains to river and 32 chains to C, the jury should have located the southeast corner of lot No. 1 at C,

thus corresponding in the call from that point 32 chains to the river and same course 18 chains to the Spanish oak, D. There was evidence of marked trees more or less conflicting along the lines. His Honor submitted, upon this phase of the controversy, the issue, "Is the southeast corner of lot No. 1 at C or at red *f*?" Plaintiffs submitted "contentions" in regard to the issue covering some twelve pages. It is impracticable to analyze them or to separate the "contentions" from prayers for instructions. Among other instructions given the jury upon the third issue is the following: "When you start from B you run east, then go 60 chains to a stake in a laurel swamp; that stake is not a natural boundary, and, there being no natural boundary, it is your duty to stop at the end of the 60 chains. If you find it to be a fact that to start from B and run east 60 chains will bring you to red *f*, it is the third call in the 300-acre tract. If you believe that there is no Spanish oak, and that due north 50 chains will take you to *y*, then it is your duty to go to *y* and say that *y* is the northeast corner of the 300-acre tract." The plaintiffs excepted to each of these instructions. The beginning point of lot No. 1, 300 acres, being admitted, there is no controversy that B is the next corner. This being so, his Honor rejected all evidence tending to show that the second corner could be extended beyond the distance called for, and located the lines as a matter of law. He withdrew from the jury the right to consider the evidence relied upon by plaintiffs to locate the southeast corner at C. The court applied the rule that, in the absence of natural objects or other well-known lines, course and distance will control in the location of a tract of land. There can be no controversy in regard to the rule. The question which frequently arises and gives trouble is what other objects or conditions will be permitted to be considered by the jury to vary the call for course and distance. It is true that a stake is not a natural boundary, and, unless we find something in the evidence more reliable, his Honor

correctly instructed the jury. It is evident that Mr. Avery had two tracts of land surveyed on the same day, and that they adjoined; that the east line of one tract was the west line of the other. If, by locating No. 2, the west line is fixed, and there is a controversy in regard to the east line of No. 1, why may the jury not consider the line of No. 2 to aid them in finding the true location of the disputed line? It is clear that, if the call for the second line of lot No. 1 had been east 60 chains to the corner of lot No. 2, the call for the corner would control the distance. Is it not practically this case? Lot No. 2 calls as the beginning "a Spanish oak, the northeast corner of the first tract." This being located, it is perfectly clear, if the evidence is true, that the call from this northeast corner south is the same line as the third call in the first tract. Therefore it is beyond controversy that, having located one line, the other is also located. The surveyor describes how he located the first call in lot No. 2 at D. If this is correct, the next inquiry arises, How will the next line be located? He says that a line south from D 18 chains reaches the old channel of the creek, and that this line, continued 32 chains, stops at C. This is in the course of the second line of lot No. 1 due east from B. He says that, if you stop at red *f*, the next call cannot be met; that a line north will not cross the creek 32 chains from red *f* and 18 chains north of the creek, but that, if the second line be continued to C, the next call corresponds with the first call in lot No. 2. It appears to us that, if the testimony is true, the jury would find no difficulty in locating the dividing line between the two tracts at C. It will be noted that in reaching the chestnut at B from A it was necessary to disregard the distance, extending the line 43¼ chains. Unless this is done, the east line of lot No. 1 would never reach *f* or C, nor would the next call reach *y*, but would run 43¼ chains north of it and never reach A, the conceded beginning corner. There is other testimony bearing upon the question which,

together with that which we have discussed, should have been submitted to the jury under proper instruction. Of course, if the jury do not find that D is the northeast corner of lot No. 1, and, therefore, lot No. 2 is not located, they would be compelled to fall back upon the call for distance and locate the southeast corner at *f*. There does not appear to be any controversy in regard to the proper location of lot No. 2. The exception is sustained.

Plaintiffs introduced a grant for lot No. 3, surveyed for Mr. Avery 6 June, 1795, "lying south of the *first,* beginning on a yew pine, the southeast corner of *said survey,* running west with said line 90 chains to a stake in his other line; thence south 21 chains and 12 links to a stake; thence east 20 chains to a maple tree, marked W. A.; thence north 21 chains and 12 links to the beginning." His Honor submitted an issue to the jury: "Is the beginning corner of lot No. 3, the 190-acre tract, at red *f* or at black E?" Plaintiffs contend that the call for the beginning point is at E, the word "first" referring to lot No. 2. Defendants contend that the call is at red *f,* the southeast corner of lot No. 1, to which they claim the word "first" refers. So far as that phase of the question is concerned, the two surveys being made on the same day for the same person, there is an ambiguity in the word "first" as applying to "said survey." The grants were issued on the same day, 9 November, 1784. Plaintiffs insist that, as Avery owned both tracts at the time of the survey, the beginning of the 190-acre tract should be located at E. His Honor charged the jury that "This third tract lies south of the *first tract*—that is, lies south of tract No. 1, or the 300-acre tract—and is the 190-acre tract." To this instruction plaintiffs excepted. The plaintiffs insist that the question of location was for the jury, and that his Honor committed error in telling them that the 190-acre tract lay south of the 300-acre tract, as a matter of law. Of course, if as a matter of law the tract lay south of the 300-acre tract, there was nothing

left to the jury, in the light of the instruction that the southeast corner was at red *f*. The surveyor says that, if you start from red *f* or C and run the next call west 90 chains, you will pass beyond Avery's line, thus disregarding the call for a stake in his *other* line, and that the land would be on both sides of Rich Mountain and include the mountain; whereas, if you start at E and run 90 chains west, you will stop "in his other line," as called for in the grant. It will be observed that the call for a yew pine does not correspond with the call for either *f* or C, which is a stake. We think that the location of the first call in the 190-acre tract should have been submitted to the jury. There was much conflicting evidence in regard to marked trees, declarations of deceased persons, etc. It will be observed that the call for the "S. E. corner of his first tract" is followed by a call "west 90 chains to a stake in his other line." It was permissible for the jury to find in these words some evidence that by the "first" tract was meant the 150-acre tract, the southeast corner of which was at E and "his other tract," the 300-acre tract. In this way the words "lying south of the first" tract may be reconciled with the calls in regard to distance, and the words "south of the first," southeast corner of "said survey" and "running west 90 chains to a stake in his other line" are all given force and effect. It is certainly a legitimate argument to be made to the jury, supported by more than a scintilla of evidence, and, if satisfactory to their minds, sufficient to sustain a verdict. We do not think that his Honor could say as a matter of law that the 190-acre tract lay "south of the 300-acre tract," thus excluding all evidence or inference tending to locate the beginning corner at E.

Plaintiffs introduced a bond for title made by R. M. Pearson (1876), obligating himself to convey to the parties named "the old fields of Toe." They then introduced a deed from Richmond Pearson conveying by way of execution of the bond of his testator the land described as "the old fields of

Toe," bounded as follows (a full description of each tract is attached), and in conclusion: "These seven tracts were originally granted by the State of North Carolina to Waitstill Avery and conveyed by Isaac T. Avery to Robert Hamilton, October 30, 1834, and by James Hamilton to W. F. McKesson, November 3, 1856; mortgaged by McKesson to R. M. Pearson February 5, 1867, which mortgage was foreclosed *by said Pearson,* and said Pearson became the purchaser."

Other deeds connecting plaintiffs with the title were introduced.

His Honor, being of the opinion that the plaintiffs did not connect themselves with the title acquired by Avery by the grants, said to the jury: "The plaintiffs do not claim under these grants; so that, when you go to ascertain where the lines are that the plaintiffs claim, that deed (Pearson's deed) must be your guide. Whenever the calls in the deed differ from the calls in the grants, you must follow the Richmond Pearson deed, because that is the color of title under which the plaintiffs claim title to this land." Plaintiffs excepted.

We think that there was error calculated to prejudice the plaintiffs in this instruction. While it is true that plaintiffs do not connect themselves with Avery's title, and their title is based upon an ouster followed by seven years' possession under color, yet the deed from Richmond Pearson expressly refers to the Avery grants and says that he is conveying the same land. It was therefore competent for the jury to look to the description in these grants for the purpose of locating the corners and lines. If there was a discrepancy between them and Pearson's deed, the jury may upon the entire evidence have reconciled it or found that the more reliable description was to be found in the grants. Of course, if upon the whole evidence they found the particular description in the Pearson deed to be irreconcilable with the grants, that would control in fixing the boundary controlling the extent of the possession.

In this record we find sixteen issues, twenty-four assignments of error and twelve pages of "contentions," which his Honor was asked to submit to the jury. The pivotal questions as to boundary were included in two issues, and his Honor practically instructed the jury how to answer them. Of course, there were other questions regarding possession, etc. The map filed with the record is not marked or the corners numbered, as the map referred to by the witnesses. If we have, after most anxious consideration, failed to grasp all of the "points," we will not be surprised. Summons was issued several years ago. We cannot but think that a reference to an intelligent surveyor, a lawyer and a layman of the same standard would have settled it within a short time. This, of course, is merely suggestive. Learned and experienced counsel have conducted the litigation and doubtless understand the case better than we do.

For the errors pointed out, there must be a

New Trial.

CHARLES F. DUNN v. ŒTTINGER BROS.

(Filed 30 May, 1908.)

1. Mortgagor and Mortgagee—Power of Sale—Foreclosure—Title Conveyed.

The grantee of a mortgagor under the power of sale by foreclosure contained in the mortgage, in the absence of collusion or fraud, takes title pursuant to the execution of the power.

2. Same—Trusts and Trustees—Termination of Trust Estate.

H. sold lands to D., who gave him a mortgage thereon to secure balance of the purchase price. Thereafter he mortgaged the same land to O., who subsequently brought suit to foreclose. In the meanwhile H. foreclosed under the power of sale contained in his mortgage and made deed to B., and after the satisfaction of his debt, paid the balance to O. without objection from D., whereupon judgment was rendered against D. for the amount yet due O. after deducting this credit. Thereafter O., by agreement between himself and B., bought an interest in the land from B. In

the absence of any fraud or collusion between B., the purchaser at the mortgage sale, and O., the holder of the second mortgage: *Held*, (1) all the right, title and interest of the mortgagor and the second mortgagee in the land was extinguished by the sale under the first mortgage; (2) the general principle of law forbidding the mortgagee to acquire title in the trust estate against the mortgagor during the continuance of the trust has no application.

3. Same—Laches, Evidence of.

When a mortgagor seeks to set aside a sale made in pursuance of a power given under a mortgage, upon the ground that the mortgagee bought in the trust estate during the continuance of the trust, and the record shows that he had had opportunities to set up the equity thus claimed in various other suits, it is at least suggestive of laches and inconsistent with his present action, though possibly not an estoppel of record.

ACTION heard before *Biggs, J.*, and a jury, at November Term, 1907, of LENOIR.

The facts disclosed by the pleadings and evidence are: Plaintiff, C. F. Dunn, was the owner of a house and lot in the town of Kinston, known as the "R. C. Hay lot" and also as the "Hotel Charles." He purchased the land on which said hotel was located from one R. C. Hay, and, to secure the purchase money, executed, 22 August, 1898, to said R. C. Hay a mortgage on said property, with power of sale. Subsequent to said time, to-wit, on 11 July, 1900, the plaintiff executed a mortgage to the defendants on what was known as the "Matilda H. Brown" lot, to secure the payment of a note for $500, and also all notes, accounts or evidence of indebtedness whatsoever which he was then owing to said Œttinger Bros. or which he might at any time thereafter create with them or contract for, whether for advances of money, merchandise or any other thing of value, whether furnished him personally or to any other persons by his order, and on such promise and conditions as might be mutually agreed upon, not exceeding the amount of $1,000 and such interest as might be due. While said mortgage of 11 July was still due and unpaid, the plaintiff executed to the defendants a second mortgage on

the lot in controversy, the Hotel Charles lot, and several other lots, to secure the $500 note secured in the prior mortgage of 11 July, 1900; a $250 note, dated 22 August, 1900; a note for $750, dated 26 December, 1900, and also "any and all additional amounts which may be due or hereafter may become due by him to them, and which have been heretofore secured by the mortgage deed dated 11 July, 1900." He also therein stipulated and agreed to pay to them all other notes, accounts or any other indebtedness whatsoever which he might at present be owing to them or at any time thereafter create with them or contract for, whether for advances for money, merchandise or any other thing, whether furnished personally or to any other person by his order or request, and on such promise and conditions as may be mutually agreed upon, not to exceed altogether the amount of $2,000 and such interest as might be due.

On 17 April, 1902, the defendants, Œttinger Bros., brought an action in the Superior Court of Lenoir County against the plaintiff to foreclose said mortgages of 11 July, 1900, and 26 December, alleging that there were due on said mortgages one note for $500, with interest from 1 January, 1901; one note for $250, with interest from 1 January, 1901; one note for $750, with interest from 26 December, 1900, and a note for $500, with interest from 1 March, 1901.

At November Term, 1902, judgment was rendered "That the plaintiff recover of the defendants the sum of $1,222.11, with interest on $1,197.95 from 9 July, 1902, till paid, this being the amount now due since the payment to the plaintiffs of the surplus over and above the R. C. Hay mortgage debt, to-wit, $980.21, paid 9 July, 1902, the plaintiffs being the second mortgagees of the mortgage in the property covered by the Hay mortgage. It is further ordered that, in case said amount is not paid within thirty days, the lands conveyed in the two mortgages, except the Hay lot, be sold (the Hay lot having in the meantime been sold under the mortgage to R. C. Hay)."

On 24 June, 1902, R. C. Hay, under the power of sale contained in the mortgage from plaintiff to him, sold the R. C. Hay lot or Hotel Charles lot at public auction, at which sale A. F. Becton became the purchaser, at the price of $2,070, and R. C. Hay executed to him a deed therefor.

R. C. Hay, after retaining the amount due him on said mortgage, paid the surplus of $980.21 to the defendants, Œttinger Bros., as second mortgagees of said land. The commissioners made their report at March Term, 1903, in which they stated that they had sold only one tract of land conveyed in the mortgages, to-wit, the Matilda H. Brown lot, for $1,750, which, together with the amount of the surplus of the purchase price of the R. C. Hay lot, more than paid the amount of the judgment. The surplus, amounting to $402.38, was paid into the Clerk's office and, by order, entered at September Term, 1903, by consent, creditors' suits against plaintiff were consolidated with the suit of the plaintiff, and G. V. Cowper, trustee of plaintiff in bankruptcy, was made a party defendant and the surplus distributed among said creditors according to the priorities of their claims.

Proceedings in bankruptcy were instituted by plaintiff on 24 June, 1902, and he received his discharge therein on 11 January, 1904. G. V. Cowper was appointed trustee of plaintiff in bankruptcy, and was finally discharged 29 June, 1904.

On 29 January, 1903, A. F. Becton purchased the R. C. Hay lot or the Hotel Charles lot and conveyed a one-half interest therein to defendants, Œttinger Bros., in consideration of $1,000 and other valuable considerations to him paid by Œttinger Bros. The valuable considerations mentioned in the deed are testified to by D. Œttinger: "Becton told me that he would sell Œttinger Bros. one-half interest at cost and expense, for he wanted me to take charge of the property and rent it out and collect rents, since he was living in the country and could not attend to it without considerable expense."

After purchasing said land and taking a deed therefor, A. F. Becton brought an action against plaintiff to recover possession of said land, the summons in which action was dated 23 August, 1902. There was a judgment by default rendered in said proceeding at January (Special) Term, 1903, which judgment was set aside on appeal to the Supreme Court as being contrary to the course and practice of the courts. There was a judgment at November Term, 1905, adjudging that A. F. Becton was owner of the land in controversy.

After the purchase of the one-half interest in said land from A. F. Becton, the plaintiff rented said land from A. F. Becton and Œttinger Bros., and on 22 January, 1903, Œttinger Bros. and A. F. Becton brought a summary ejectment against plaintiff before a justice of the peace, in which proceeding plaintiff was ejected from said premises.

After the plaintiff had been ejected from said Hotel Charles or R. C. Hay lot, D. Œttinger swore out a warrant before a justice of the peace against him for trespassing on said lot, in which proceeding he was found guilty.

The plaintiff contends that, Hay having a mortgage on the land in controversy, and the defendants, Œttinger Bros., holding a second mortgage on the same land, executed on 26 December, 1900, to secure the indebtedness named in said mortgage and also the indebtedness secured in the mortgage of 11 July, 1900, the defendants did not have the right to buy the one-half interest in the land in controversy from A. F. Becton, freed from the trust in favor of the plaintiff; that the plaintiff having been discharged in bankruptcy and the estate closed and the trustee discharged more than two years before the bringing of this action, the trustee is barred of any right of action and the plaintiff is entitled to bring the action in his own name; that none of the various actions to which the plaintiff was a party, set up as estoppels on the part of the defendants, pass upon the question involved in this suit, nor could

the right of the plaintiff in this suit have been litigated in any of those actions, and that he is not estopped thereby.

The plaintiff tendered the following issue: "What was the value of the lot in controversy at the time the defendants purchased one-half interest therein from A. F. Becton?" His Honor declined to submit such issue, and plaintiff excepted.

The plaintiff proposed to prove that, at the time of the purchase of the one-half interest in the lot in controversy by defendants of A. F. Becton, the said lot was worth $5,000 or $5,500. Defendants objected, which objection was sustained, and plaintiff excepted.

The plaintiff requested his Honor to charge the jury as follows: "That if they believed the evidence they would find that the defendants held a half interest in the land in controversy in trust for the plaintiff, subject to the repayment of the purchase price therefor, less what they may have received from said half interest in said land." The court refused to give these instructions, and the plaintiff excepted and appealed.

W. C. Munroe for plaintiff.
Rouse & Land and *Loftin & Varser* for defendants.

CONNOR, J., after stating the facts: The general principle upon which the plaintiff's learned counsel rests his client's right to recover is universally recognized and enforced. That a trustee cannot, during the existence of the trust, buy in or by any other method, either directly or indirectly, acquire the title to the estate or property to which the trust attaches, and hold it against his *cestui que trust*, is a basic and cardinal principle in equity. It is equally well settled with us that the relation of mortgagor and mortgagee comes within the class or relation to which this principle applies. *Fronerberger v. Lewis*, 79 N. C., 426, in which *Judge Reade* says that the rule is so well established "that we would scarcely be excused for encumbering the case with authorities, except to

show how general is the rule and how few the exceptions." He cites and comments upon almost every case in our reports in which the rule was applied. *Taylor v. Heggie,* 83 N. C., 304, is directly in point, provided there was any trust relation existing between Œttinger and Dunn at the time Becton conveyed to the former. It is settled that a sale of property, pursuant to a power given in the mortgage, in the absence of fraud, is effectual to foreclose the equity of redemption of the mortgage. "A sale under a mortgage or deed of trust, if valid and free from fraud or unfairness, will extinguish the equity of redemption in the mortgaged premises, leaving him no title or interest of any kind." 27 Cyc., 1503. The sale also cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power. *Ib.* This is clearly established by the decision in *Paschall v. Harris,* 74 N. C., 335. Plaintiff's intestate held a second mortgage on the *locus in quo.* The holder of the first mortgage executed his power of sale and sold the land, making title to the purchaser. Plaintiff filed a petition to sell the interest of his intestate in the land. *Pearson, C. J.,* said: "Plaintiff's intestate had an equity of redemption, but it was subject to a power of sale. * * * The right of the intestate was extinguished by the sale." This is the doctrine uniformly recognized and, we think, founded upon sound principle. It would seem, therefore, that when Hay sold the property under the power contained in the mortgage, and it was purchased by and conveyed to Becton, all right, title and interest of Dunn, as mortgagor, and Œttinger, as mortgagee, was extinguished. In respect to this property, no trust or other relation existed between Dunn and Œttinger. It is not necessary for us to discuss the question whether Œttinger could have purchased at the sale and acquired the title, discharged of the trust. Mr. Jones says that he could do so. 11 Jones Mortgages, sec. 1884. He is sustained by the English authority cited. *Taylor v. Heggie, supra,* is to the con-

trary, and we have no disposition to disturb the doctrine of that and other cases upon the question. Here, however, Becton was the absolute owner, holding title under a power created by Dunn in Hay. It is a rule of law that when one takes title pursuant to the execution of a power he is in under the grantor of the power (22 Am. and Eng. Enc., 1125); hence Becton was in as if Dunn had conveyed directly to him at the date of Hay's mortgage. Œttinger, who had brought suit to foreclose his mortgage on this and other lands prior to the sale, recognizing the effect of the sale by Hay under the power, took no decree in regard to the property, but accepted and credited his debt with the surplus of the purchase money paid by Becton, after discharging Dunn's indebtedness to Hay. Dunn, who is presumed to have notice of the proceedings in the action against him in respect to the property, makes no objection to the receipt of the surplus, and takes benefit of it by way of reducing his debt. We can see no reason why, after Becton took title and paid the money, Œttinger could not purchase from him and acquire a good title, free from any trust or obligation to Dunn. The learned counsel has cited to us a large number of cases, English and American, bearing upon the subject. In *Bennett v. Austin*, 81 N. Y., 322, it appeared that the junior mortgagee attempted to purchase for himself the land mortgaged, at a sale for foreclosure of the prior mortgage. It was well decided that he could not do so. There, at the time of the purchase, the mortgagor had an equity of redemption. It was foreclosed at the time and by means of the sale. The language of *Miller, J.*, is illustrative of the distinction between that case and this: "He could not be a trustee before the sale, and immediately afterwards a stranger to the trust. A trustee cannot thus get rid of his obligation, discharge the trust and reap the advantage of a sale for himself individually." This is strictly in line with the equitable doctrine, but it is to be noted that the defendant, by the very act of making the pur-

chase, sought to discard his trust obligation, whereas here the property had by the sale to Becton been removed from the trust. It was impossible for either Dunn or Œttinger, by any act of theirs, to bring it back into the trust. Œttinger is not seeking to "discharge the trust" by buying at the sale under the mortgage. That was done by the sale to Becton. So, in *Brantly v. Kee,* 58 N. C., 322, the defendant was a trustee for others at the time he purchased the slave from the trustee having a prior right. Thus Bispham (Eq., sec. 92) says: "Wherever one person is placed in such relation to another by the act or consent of the other or the act of a third person or of the law that he becomes interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to him with whose interest he has become associated." The difficulty with plaintiff's case consists in the fact that, after the sale to Becton, the defendants occupied no relation to Dunn in respect to the property; they were not "interested with him" in the property. The interests of both had passed to Becton. It must be conceded that the decision in *Boyd v. Hawkins,* 37 N. C., 304, is very much in point. Boyd conveyed the property in trust to Fitts to pay certain debts to Richard Boyd and Thompson. Fitts conveyed the property to Hawkins upon the same trusts. A part of the land was situate in Granville County, and the deed was not recorded in that county. The Bank of New Bern procured judgment against Boyd and secured a levy upon and sale of the land in Granville to pay the judgment. Robards, the attorney for the bank, bought at the sale and took a deed from the Sheriff. He conveyed the land to Hawkins. The Court held that Hawkins held the land in trust for Boyd. The learned counsel strongly urges that there is no distinction between the cases. It must be conceded that the sale under the execution vested in Robards title paramount to that of the trustee, Hawkins. The learned Judge writing the opinion makes no mention of this fact, but treats

the parties as occupying the relation of trustee and *cestui que trust* with respect to the land. The decision is not in harmony with more modern cases and authority. If we could see the slightest evidence of any preconcerted arrangement or understanding between Becton and defendants looking to a joint purchase of the lot at the mortgage sale by Hay, suppression of bidding or any other conduct calculated to prejudice the plaintiff's right, we should not hesitate to declare defendants trustees for plaintiff, unless by his conduct he is equitably estopped. The balance of the purchase money, after paying Hay's debt, was applied to plaintiff's indebtedness to defendants. He had several opportunities in his various lawsuits with Becton and defendants to set up the equity which he now seeks to use as a cause of action. He filed his petition in bankruptcy, making no suggestion that he had any such equity or interest in the land. The decrees in the suit of defendants to foreclose his mortgages were made, confirming the sale of the other property and crediting the plaintiff with the surplus proceeds of the sale of the Hay property, without any suggestion of the present claims. While possibly not an estoppel of record, certainly all of the acts and omissions of plaintiff are suggestive of laches on his part and are inconsistent with his present contention. After a careful consideration and examination of the authorities, we concur with his Honor's ruling refusing to submit the issue or give the instruction requested. There is

No Error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

FALL TERM, 1908.

H. T. DAVENPORT v. NORFOLK AND SOUTHERN AND SUFFOLK AND CAROLINA RAILROAD COMPANIES.

(Filed 16 September, 1908.)

1. **Railroads—Right of Way, Construction of—Improper Drainage—Damages.**

A railroad company is liable in damages for negligently and improperly stopping the drain ditches on plaintiff's land, so as to injure his crop by the water flowing thereon from his own and adjoining lands, incidental to the building and ditching of its roadbed, though the right of way through plaintiff's land may previously have been purchased or regularly acquired by condemnation proceedings.

2. **Same—Evidence—Instructions—Accumulated Waters.**

In an action for damages to crops, brought against railroad companies, incident to the negligent construction of the companies' roadbed, whereby the crops of plaintiff were injured by the usual flow of water upon his own and from upper and adjoining lands, there was evidence tending to show that, prior to the building of the roadbed, plaintiff's land was drained by a number of lead ditches into which a number of smaller ditches on his land emptied; that defendants, in constructing their roadbed, crossed all these ditches, leaving openings with pipes in them for the drainage of the lead ditches, but closing the smaller ditches; that for the increase of flow of the water caused by the ditching and construction of the roadbed the pipes for carrying the water off in the lead ditches were insufficient: *Held*, (1) the trial Judge properly instructed the jury, if they believed the evidence, to

award damages in full compensation for the injury arising in consequence of the stoppage of the small ditches, and that the openings for the passage of water through the lead ditches should have been sufficient to allow the water to pass through, with adequate piping, and the ditches should have been properly opened for the passage of the water; (2) that defendants had the right to cut a ditch, when necessary, from adjacent lands along their roadbed across plaintiff's land, but it was the duty of the defendants to have the leading and lateral ditches of sufficient capacity to carry off the additional quantity of water thereby caused to flow on plaintiff's land.

3. Same.

A prayer for instruction that a railroad company, in constructing its roadbed, had the right to accumulate the water which would naturally flow onto plaintiff's lands and convey the same by lateral ditches in and upon his lands, concluding "and for damages incident to this right no recovery can be had," is erroneous, when there is evidence tending to show that there was no sufficient drainage provided by the defendants for carrying it off.

4. Evidence, Opinion—"Expert Testimony" Upon the Facts—Improper Drainage—Damages to Crops.

Testimony of a witness who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion thereon, is competent to show the damage to his crop by reason of an overflow of water on his land, caused by improper construction by defendants of their roadbed thereon, and he may testify to the number of acres in cultivation of each kind of crop, the amount of each he would have made except for the injury, and the price for which he could have sold it.

ACTION to recover damages for alleged negligent construction of the roadbed of defendant companies, tried before *Cooke, J.*, and a jury, at Spring Term, 1908, of TYRRELL.

There was evidence tending to show that defendant companies, having condemned a right of way, proceeded to construct their roadbed through the lands of plaintiff, and that such roadbed crossed a number of lead ditches made by plaintiff for the proper drainage of his lands, and also a number of tap ditches conveying the water of said land to the lead ditches at various points below the defendants' roadbed; that defendants constructed culverts or put in pipes at the points where these lead ditches had passed under the roadbed, but did not

make any such drainage for the tap ditches, but, in constructing their roadbed, by lateral ditches the water which had been carried by these tap ditches, and also some water from adjacent lands, was conveyed along the side of the roadbed into the lead ditches, and by reason of the increase of water the culverts were not sufficient to carry off the waters of the usual and ordinary rains falling in the vicinity, and by reason of this defect these waters were ponded back upon the lands of plaintiff, causing much damage and injury to plaintiff's lands and the crops growing thereon.

The plaintiff, testifying to his alleged injury and the cause thereof, among other things, said: "The water on the north side of the railroad drains southwardly to a swamp. My land lies between the letters 'A' and 'D' on the map. Before the railroad was constructed my ditches ran just as they do now. The railroad cut ditches on each side of the track and threw up an embankment or roadbed, and that caused all the tap ditches to fill up, only leaving open the lead ditches at 'A,' 'B' and 'C.' The water before that time went southwardly and was carried off by the lead ditches and tap ditches which drained my land. I cleaned out these ditches in 1893. My father and myself were renters of the land, and I purchased it in 1897. From 1897 we made good average crops for that time. Before the railroad cut the ditches none of the water east of 'D' or west of 'A' came down on my land, but since then the water for a distance of half a mile east of 'A' has come down on my land, and when there has come a big rain it would come down from east of 'D.' I think the roadbed is from two to three feet high. The land on both the east and west sides of my land is higher than mine, and the fall of the land is from the north. The conditions, as changed by the railroad, have greatly increased the flow of water on my land, and, the culverts not being sufficient to take it off promptly, the water ponded on my land, and on the south side the ditch would not be sufficient to hold the water.

I have seen the water so high that it flowed over the top of the railroad. In 1906 I had in cultivation about 180 acres of corn, cotton, peas and sweet potatoes. There were 68 acres of cotton, 80 in corn, 5 in potatoes and the balance in peas."

Witness was here asked: "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906?" To this question and the testimony in response thereto defendants objected; objection overruled; exception. (Exception 1.)

The witness answered: "I would have made a quarter of a bale of cotton per acre, and I only made seven bales on the 68 acres. Cotton was worth 10 to 11 cents per pound, and the bales weighed 500 pounds each. I would have made three barrels of corn per acre, and only made fifty barrels on about 80 acres. Corn was worth $4 per barrel. The stock peas were not damaged so much. The potato crop was a failure."

Issues were submitted, and responded to by the jury, as follows:

1. "Was the railroad of defendants negligently constructed, and if so, was water thereby pounded on the lands of plaintiff, as alleged?" Answer: "Yes."

2. "If so, what damage to his lands and crops has plaintiff sustained thereby?" Answer: "Fifteen hundred dollars."

3. "Has the cause of any injury to plaintiff's land in respect to drainage and as complained of by plaintiff been removed, and if so, when?" Answer: "Yes; 28 January, 1908."

Motion for new trial by defendants for error of the court in its ruling on the question of evidence as above indicated, and for errors in the charge. Motion overruled, and defendants excepted. Judgment on verdict for plaintiff, and defendants excepted and appealed.

Aydlett & Ehringhaus for plaintiff.

Small, MacLean & McMullen for defendants.

HOKE, J., after stating the case: In *Mullen v. Canal Co.*, 130 N. C., 496, a case concerning chiefly the rights acquired by condemnation proceedings, *Douglas, J.*, delivering the opinion of the Court, on page 503, said: "It is well settled that no damages are contemplated in the original condemnation, except such as *necessarily* arise in the proper construction of the work." And in *Adams v. Railroad,* 110 N. C., 325, *Mr. Justice Avery,* in declaring the same doctrine, page 330, said: "Whether an easement passed by private sale or condemnation, the estimate of its value is presumed to be made in contemplation of the observance on the part of the corporation of the golden maxim of the law, by so exercising its privilege as to inflict no unnecessary injury on the servient owner. Lewis on Eminent Domain, 571; Angell on Water Courses, 97; *ib.*, 95, 95a; *Lillotran v. Smith,* 32 N. H., 94; *Embry v. Owen,* 6 Exc., 369; *Pugh v. Wheeler,* 19 N. C., 50; *Walton v. Mills,* 86 N. C., 280; *Wilhelm v. Burleyson,* 106 N. C., 389; Gould on Waters, 209, 214, 401, 405; *Hasher v. Railroad,* 60 Mo., 329; *Curtis v. Railroad,* 98 Mass., 428; *Lawrence v. Railroad,* 71 C. L. Repts., 643; Mills on Em. Domain, 81 (p. 220); *Munken v. Railroad,* 72 Mo., 514; *Railroad v. Wicker, supra.*" And, further, on page 331: "It being admitted as a general rule that such injuries to the servient tenement as are necessarily incident to a skillful construction of the road are considered as included in the compensation for the easement, it is clear that the skill is not to be measured by the cost of the structure alone, but by its completion upon such a location and in such a manner as to provide for the public safety and convenience without unnecessary injury to the land subject to the servitude. When the attempt is made to draw and define the line of legal right between two such conflicting claimants, it is essential always to recur to the rule, *Sic utere, ut non alienum lædas,* as the touchstone by which the culpability of conduct is to be determined. The persons who fixed the

cost of the easement contemplated the building of the structure with an eye to the safety and convenience of the public and subject to this controlling purpose, with a proper regard for the rights of the servient as well as dominant owner."

Applying these principles, it is generally held that, for damages incident to negligent construction of a company's road, recovery may be had, though a right of way has been purchased or regularly acquired by condemnation proceedings. The Judge below, having properly informed the jury of this general principle and framed the issue so as to enable them to determine the precise question, among other things and on this issue, charged the jury: "If the jury believe the evidence, there were certain lead ditches upon the plaintiff's land indicated at 'A,' 'B,' 'C,' 'D' on the map, and there were also a number of smaller ditches, called tap ditches, which emptied into the lead ditches. The railroad crossed all these ditches and provided no opening for the tap ditches, but did leave openings for the lead ditches, in which openings they placed pipes and cut ditches on each side of the railroad on its right of way for the purpose of carrying off the water that was brought by the small ditches into the lead ditches, as well as the other water; and, this being the scheme of the defendants, it must have been in full compensation for the stoppage of the small ditches and as effective as if said small ditches had been left open, and the opening for the passage of the lead ditches must have been sufficient to allow the water to pass through, and the piping put in them must have been sufficient for the purpose and the ditches properly opened for the passage of the water." And, in reference to the water which the evidence tended to show the lateral ditches had carried into the lead ditches from adjacent lands, the court further charged the jury on the issues as follows: "If the water before drained towards the plaintiff's land, and if it was necessary in order to drain the railroad track to cut the ditches from the ad-

jacent lands across the plaintiff's land, then the defendants had the right to make a continuous ditch from the said adjacent land on one side across the plaintiff's land and upon the adjacent lands on the other side; but if the jury shall find that this was done, then it was the duty of the defendant companies to have the ditches, both lateral and lead, of sufficient capacity to carry off this water, in addition to that which would be upon the land without this change. And if the jury shall find that the defendants failed to perform their duty, as explained to you above, and as a consequence of such failure the plaintiff's lands were flooded and damaged, then the jury should answer the first issue 'Yes'; if they shall not so find, they should answer the first issue 'No.'"

This, we think, is a just rule by which the rights of these parties should be determined, and is in accord with numerous decisions of this Court on the subject. *Mullen v. Canal Co., supra; Parker v. Railroad,* 123 N. C., 71; *Parker v. Railroad,* 119 N. C., 677; *Fleming v. Railroad,* 115 N. C., 676; *Staton v. Railroad,* 109 N. C., 337; *Emery v. Railroad,* 102 N. C., 209; *Railroad v. Wicker,* 74 N. C., 220; *Porter v. Durham,* 74 N. C., 767.

In *Emery's case, supra,* it was held: "6. It is the duty of a railroad company to so construct its culverts that they will carry off the water of the streams over which they are built under all ordinary circumstances likely to occur in the usual course of nature, including such heavy rains as are ordinarily expected, although of only occasional occurrence. But it is not liable for damages resulting from its culverts being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls." And in *Wicker's case* the principle was held to apply both to "natural and artificial drainways."

A perusal of these authorities fully sustains the charge of the court and the principles applied by him in the trial of the cause.

Defendants in apt time presented several prayers for instructions, embodying the position, as we understand them, that if the lands of plaintiff were lower than the adjacent lands on either side of same the defendants would have the right to accumulate the water which would naturally flow on plaintiff's lands and convey the same by lateral ditches in and upon the lands of the plaintiff, and for damages incident to the exercise of their right no recovery could be had. The court gave the first part of the prayer, but declined to give the latter part of the instruction, to the effect "that no recovery could be had," and this was as favorable to defendants as they had any right or reason to expect. Conceding that the defendants, if the proper construction and safety of their roadbed required it, had the right to convey the water in question by lateral ditches to the lead ditches of plaintiff, the grievance is not that they carried it there, but that no sufficient culvert or drainage was made to carry it off. And this being a duty encumbent on the defendants, under the authorities cited, for damages arising from the negligent breach of such duty, recovery could be had, notwithstanding the acquisition of the right of way.

The exception urged for error, that the plaintiff, Davenport, testifying on his own behalf, was allowed to answer the question, "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906?" cannot be sustained. This, though often expressed in the form of opinion, is an estimate given by a witness who had personal observation and cognizance of the conditions, and should be considered as the statement of a fact. It is the witness' impression, from conditions actually observed and noted by him. Even if it should be regarded as more strictly "opinion evidence," when it comes from a source of this kind, from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely

to aid the jury to a correct conclusion, such evidence is coming to be more and more received in trials before the jury. McKelvey speaks of it with approval as "expert testimony on the facts." McKelvey, p. 230.

The testimony offered and admitted comes, we think, within this principle, and its admission is sustained by well-considered decisions in this and other jurisdictions. *Wade v. The Telephone Co.*, 147 N. C., 219; *Britt v. Railroad, ante; Taylor v. Security Co.*, 145 N. C., 385; *Sikes v. Paine*, 32 N. C., 280; *Eldridge v. Smith*, 95 Mass., 140.

After giving the case most careful consideration, we find no error in the record, and the judgment below must be affirmed.

No Error.

WINDSOR BARGAIN HOUSE v. FRANK WATSON.

(Filed 16 September, 1908.)

Vendor and Vendee—Agricultural Lien—First Year's Crop—Lien for Second Year—Subrogation—Quære.

Plaintiff had a valid agricultural lien on defendant's crop under a written instrument containing in addition a chattel mortgage on defendant's mule and cart. The remaining crop at the end of the year was sufficient to pay a balance still owing by defendant, and at defendant's request it was agreed that he should retain the remaining crop, together with the mule and cart, to enable him to make a crop for the ensuing year, the plaintiff to make advancements therefor in a certain amount, inclusive of that due for the year preceding: *Held*, it was competent for the parties to agree that the crop of defendant then on hand and the mule and cart to be used in making the crop for the second year should be considered as advancements for that year, so as to constitute a valid lien on the second year's crop for their payment. As to whether the party making the advancement would otherwise be remitted for his security to the original lien on taking the second security, *quære*. (*Lowdermilk v. Bostick*, 98 N. C., 299, cited and distinguished.)

BARGAIN HOUSE *v.* WATSON.

ACTION of claim and delivery, to enforce a lien and mortgage on defendant's property, tried before *O. H. Allen, J.*, and a jury, May Term, 1908, of BERTIE.

Formal execution of the lien, containing in addition a chattel mortgage on the property seized, a mule and farm cart, having been admitted, issues were submitted and responded to by the jury as follows:

1. "Is the defendant indebted to the plaintiff, and, if so, in what amount?" Answer: "Yes; $88.35."

2. "What part of said debt, if any, was a debt of the previous years?" Answer: "Seventy-eight dollars and ten cents."

3. "Did the defendant agree that the said amount might be included in the amount named in the crop lien of 1906 upon surrendering and canceling liens on crop and mule and cart to enable him to make crop of 1906?" Answer: "Yes."

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Winston & Matthews for plaintiff.

W. R. Johnson for defendant.

HOKE, J., after stating the case: The evidence tended to show that plaintiff had a valid agricultural lien on the crop of defendant for 1905, the instrument containing in addition a chattel mortgage on the defendant's mule and cart, the property seized by process in the present action; that advancements were made for the year 1905, and in March, 1906, defendant, having paid the account, except $78.10, had enough of the crop and property in hand to pay the plaintiff's claim in full, but on defendant's application it was agreed that defendant might retain the crop of 1905, together with the mule and cart, to enable him to make the crop of 1906, and that plaintiff was to make advancements for the year 1906 to an amount not to exceed $150, and

that this balance of $78.10 should be considered and constitute a part of the amount to be advanced for the year 1906.

Speaking to this question, John T. Smithwick, a witness for plaintiff, among other things, testified: "In March, 1906, Watson came in and said, if we would let him keep his mule to make another crop and also let him keep his crop under mortgage to us, and would carry the balance of $78.10 as a part of $150 he wanted for the year 1906, that he would make a good crop and pay out, and would secure it with a crop lien with a chattel mortgage clause. This arrangement was made, and we balanced his account, took the crop lien with chattel clause for 1906 and charged him on his account for 1906 with $78.10 balance. After that he got $10.25 in cash and did not trade any more."

On this testimony, we are of opinion that the claim of plaintiff should be upheld, both as an agricultural lien on the crop of 1906 and as a valid chattel mortgage on the property seized, to-wit, the mule and cart. While the Court has held that, in order to an effective agricultural lien, the requisities of the statute must be complied with, and, among other things, that the advancements must be made after the agreement is perfected (*Clark v. Farrar,* 74 N. C., 686), our decisions are also to the effect that, if part of the advancements are made at the same time the instrument is executed, both acts being part of one and the same transaction, this requirement of the statute is satisfied. *Reese & Co. v. Cole,* 93 N. C., 87. And this claim of plaintiff of $78.10 should clearly be considered an advancement. The plaintiff had a lien to secure this amount, undoubtedly good, on the crop of 1905 remaining on hand and on the mule and the cart. There is no good reason in requiring the plaintiff, in order to make this claim a valid advancement on the crop of 1906, to foreclose and realize on his lien and then turn the amount over to defendant. It was competent

for them, as they did, to make the agreement that this interest of plaintiff's in the crop of 1905, then on hand, and the mule and the cart to be used in making the crop of 1906, should be considered as an advancement for 1906. And these facts having been established by the verdict, the property seized, to-wit, the mule and cart, comes within the exact terms of the lien and the chattel mortgage contained in the same.

In *Brown v. Brown,* 109 N. C., 124, the Court held:

"1. The 'advancements' for which a lien is created in favor of a landlord by section 1754 of The Code embraces anything of value supplied by the landlord to the tenant or cropper in good faith, directly or indirectly, for the purpose of making and saving the crop.

"2. When such advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, *e. g.,* farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary, *e. g.,* dry goods and groceries, whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop."

And in *Thigpen v. Maget,* 107 N. C., 39, it was held that where a landlord allowed his tenant to retain parts of the undivided cotton seed and crops of one year to enable him to make the next year's crop it should be regarded as an advancement for which the claimant could enforce a landlord's lien.

These authorities fully support the conclusion that, under the agreement established, this demand for $78.10 is an advancement for the year 1906, and, as heretofore stated, this being true, this amount is part of the debt for which plaintiff holds the chattel mortgage on the property. The Court is not inadvertant to the case of *Lowdermilk v. Bostick,* 98

N. C., 299, in which an item for corn retained from the crop of a former year was disallowed as a claim secured by an agricultural lien for the current year. But an examination of that case will disclose that there was no agreement between the parties that the item in question should be secured by the agricultural lien, nor was there any sufficient or satisfactory evidence that said item was an advancement in aid of the crop for the current year. Even if the defendant should establish his position that the claim is not within the protection of the present lien held by plaintiff, there is doubt if it would avail for his protection. There is authority to the effect that in such case, and on the facts presented here, the plaintiff would be remitted for his security to the original lien, which was undoubtedly good before it was cancelled on taking the present security. Shuford on Subrogation, sec. 20; *Davidson v. Gregory,* 132 N. C., 393.

There is no error, and the judgment below will be affirmed.

No Error.

W. R. COLEMAN ET AL., ROAD COMMISSIONERS, v. J. L. COLEMAN.

(Filed 16 September, 1908.)

1. **County Treasurer — Mandamus to Compel Statutory Duty — No "Money Demand"—Jurisdiction—"Chambers."**

   An action of *mandamus* to compel a County Treasurer to pay over to certain commissioners moneys he has on hand, in accordance with the requirement of a statute, is not a money demand and is properly brought before the Judge at chambers.

2. **Same—Issues of Fact—Procedure.**

   If it appears, in an action for *mandamus* heard at chambers to compel a County Treasurer to pay over certain moneys on hand, in accordance with a statutory requirement, that issues of fact are involved or that the case has been improperly brought before the Judge there, it should be transferred so as to be tried during term and not dismissed.

3. County Treasurer—Funds—Rightful Custodian—Mandamus.

A County Treasurer required by statute to pay accounts against the road fund under certain machinery provided for the purpose cannot be compelled by *mandamus* to turn over the funds to a road commission, as by the language of the statute he is the rightful custodian.

4. Appeal and Error—Pleadings—Amendment—Discretion.

The refusal of a motion to be allowed to amend pleadings is in the discretion of the trial Judge and not reviewable on appeal.

ACTION heard by *O. H. Allen, J.*, at chambers, 12 February, 1908, in WARREN.

THIS is an action for a *mandamus* to compel the defendant, who is the Treasurer of Warren County, to deliver to the plaintiffs, the road commissioners for Hawtree Township, the fund which he has received from taxes levied in 1905 for road purposes, amounting to $335.96. The act of 1899, ch. 581, as amended by the act of 1905, ch. 161, required the county commissioners to levy the road taxes for Hawtree Township upon the recommendation of its road commissioners. The money collected from the taxes so levied is required to be paid to the County Treasurer and kept separately from other funds by him. He is given a commission for "receiving and disbursing the road fund," and is further required "to pay the accounts against the road fund of the county and of the township, when itemized statements of the same have been certified to (the road commissioners) by the county road superintendent and approved by them." Acts 1899, ch. 581, sec. 14; Acts 1905, ch. 161, sec. 1. The plaintiffs allege that "the defendant failed and refused to deliver the road fund to them or on their order, when demanded, or any part thereof, for the purpose of being used and expended by them for the improvement of the public roads of the township, as he is bound by law to do, though he did pay to them the taxes collected for road purposes in the year 1906." The summons was returnable before the Judge, at chambers, on 12 February, 1908. The de-

fendant demurred to the complaint, upon the ground that the Judge had no jurisdiction of the case at chambers, and, further, that no cause of action is stated in the complaint. The demurrer was sustained, the action was dismissed and the plaintiffs appealed.

T. T. Hicks and *Tasker Polk* for plaintiffs.

T. M. Pittman, J. H. Kerr and *S. G. Daniel* for defendant.

WALKER, J., after stating the case: The action was properly brought before the Judge, at chambers, if the plaintiffs have any such cause of action as is stated in the complaint. The object of the action is not to enforce the payment of a "money demand," but to compel the performance by the defendant, as Treasurer of the county, of a public duty. Because in the discharge of that duty he must deliver the fund to the plaintiffs does not make it a money demand. If the plaintiffs are entitled to the possession of the "road fund," as they allege, their action is not one to enforce the payment of money to themselves, which money they could recover by judgment and execution in an ordinary action for that purpose, but it is of a very different nature, and *mandamus* is the appropriate remedy. They would get the money, it is true, but not because the defendant was indebted to them, but because the law required him to deliver it to them, and he had failed and refused to discharge the duty imposed upon him. We think this view of the law is sustained by several decisions of this Court in like cases. *Martin v. Clark*, 135 N. C., 178; *Eubank v. Turner*, 134 N. C., 80; *Jones v. Commissioners*, 135 N. C., 218; *Audit Co. v. McKenzie*, 61 S. E., 283. If there are issues of fact to be tried, or the case has been improperly brought before the Judge at chambers, it should, by order of the Judge, be transferred to the Superior Court for trial at term, and not dismissed. *Eubank v. Turner*, 134 N. C., 80; *Jones v. Commissioners*, 135 N. C., 218.

But we do not think the plaintiffs have stated any cause of action in their complaint. The act of 1899, ch. 58, as amended by the act of 1905, ch. 161, does not authorize them to take possession of the fund, but the Treasurer is its rightful custodian. It is clear that the plaintiffs had no power under those acts to disburse the road fund. That duty is required to be performed by the County Treasurer, upon the certificate of the "County Road Superintendent" and the approval and order or orders of the plaintiffs. If any one is in law aggrieved by the failure or refusal of the Treasurer to discharge this duty, a *mandamus* will lie to compel its performance.

The plaintiffs moved to amend their complaint, but, as the motion was denied and its refusal was strictly within the discretion of the Judge, we cannot review the exercise of that discretion in this Court.

There was no error in sustaining the demurrer and dismissing the action.

Affirmed.

MARY ANN RUE v. W. A. CONNELL ET AL.

(Filed 16 September, 1908.)

Wills, Interpretation of—Ademption—Intent.

In order to establish an ademption of a specific devise, there must be an alteration in the character of the subject-matter, made or authorized by the testator himself. Therefore, when there is a devise of certain lands by their known name, concerning which there was a claim under a contract to convey made by some third person, which in the lifetime of the testator had been unsuccessfully contested by suit, and after his death it had successfully been contested and the purchase price paid to the executors and held by them free from claim of debt of the testator, and it further appearing that the testator died in possession, believing he was the owner in fee, his intention will be construed as devising, not only the land itself, but all of his right, title or interest therein, and by the specific devise the proceeds of sale of the land will go to the devisee named.

CONTROVERSY without action, submitted to *O. H. Allen, J.*, at June Term, 1908, of WARREN.

From the judgment rendered the defendants Mary Sturges and Maude Connell appealed.

Shepherd & Shepherd for plaintiff.

T. M. Pittman and *J. H. Kerr* for defendants.

BROWN, J. The material facts in this controversy are as follows: Thomas Connell died in Warren County on 1 January, 1905, leaving a will, which was duly probated. The first clause of the will is: "To my wife, Addie May Connell, during her widowhood, I give, grant and bequeath all and every right, title and interest in and to my Tusculum plantation and all its belongings, after paying all my honest debts and my burial expenses. But should she bring forth an issue or issues (children) by me, they shall be the rightful heirs thereto at her marriage or death; but should there be no issue (children) by me from her at her marriage with another man or at her death, it shall be the rightful property of my daughter, Mary Ann Rue, her heirs and assigns."

Addie May Connell had no issue by Thomas Connell. She married Sturges in the year 1906, and is still living. She dissented from the will in due time and was allowed her dower in her husband's other lands, and a child's part of his personal estate, the latter not having been yet distributed.

At the date of the will and at the death of the testator he was in possession of the Tusculum plantation and deemed himself the owner in fee. The plantation had been sold under a trust deed and acquired by the testator, but at the date of the will a suit was pending by P. G. Alston to redeem the property. This suit resulted in favor of the testator in June, 1903, but was renewed in January, 1905, after the testator's death, and finally resulted in a judgment in favor of Alston. The facts are set out in the report of the

case in 140 N. C., 485, which facts are made a part of the record upon this appeal. After an accounting had in pursuance of the decree of this Court, the case was again brought here, and is reported in 145 N. C., p. 1.

Under the final decree the interest of Thomas Connell in the Tusculum property is fixed at $2,950, and upon payment of that sum the heirs and devisees of the said testator were required to and did execute a deed to P. G. Alston. The costs and expenses of said action, including counsel fees, to the estate of Thomas Connell were $1,000.

The fund received from Alston is now in the hands of the executors and is not needed for the payment of the debts of the said testator.

Upon the foregoing facts the plaintiff, Mary A. Rue, claims that the executors of said estate were bound to defend said action and title; that the cost thereof is no charge upon Tusculum or her, and that the $2,950 should be paid over to her, as it represents what was devised to her of Tusculum by her father.

The defendants claim that Tusculum did not belong to deceased at his death or the making of the will, and was not therefore his to give away, and therefore nothing passed to plaintiff, and she is entitled to no part of said fund received from it, but only as a residuary legatee or devisee.

It is contended by the learned counsel for the appellants that the existence of the contract of sale at the death of the testator worked an ademption of the devise to the plaintiff, and that she takes nothing under that clause of the will. The term "ademption" is used in legal parlance to describe the act by which the testator pays to his legatee in his lifetime a legacy which by his will he had proposed to give him at his death, or to denote the act by which a specific legacy has become inoperative on account of the testator having parted with the subject of it. 1 Roper Leg., 365; *Langdon v. Astor,* 16 N. Y., 40.

There must be an alteration in the character of the subject-matter of a specific legacy made or authorized by the testator himself after making his will, or it will not operate as an ademption. If the change in the form of the property is brought about by the act of another, it will not effect an ademption of the legacy if the property in its new form is in the possession of the testator at his death. 1 Underwood Wills, sec. 411. So it has been held that, where the testator has made a binding offer of sale of his property bequeathed in a will already executed at the time, which offer is not accepted and the sale not finally consummated until after the death of the testator, no ademption of the legacy is worked, but the legatee will receive the proceeds. *In re Pearce,* 8 Reports, 805; Gardner on Wills, p. 566. So, where a testator bequeathed certain notes specifically described, and then changed them by renewal into another form, securing the same debt, it was held that the legatee was entitled to the new securities. *Ford v. Ford,* 23 N. H., 212; *Gardner v. Printup,* 2 Barb. (N. Y.), 83.

Where the intention of the testator with regard to the effect of his subsequent acts is reasonably clear, such intention will largely govern.

Tested by these general principles of the doctrine, we find nothing in the facts agreed which tends to work an ademption of the specific legacy to the plaintiff. The descriptive words in the will are sufficient, not only to pass the fee simple of the Tusculum plantation to the plaintiff as remainderman, the estate *durante viduitate* having terminated, but to pass any lesser interest which the testator may have held in the property. The intention is plainly manifest that whatever rights he owned therein should ultimately become the property of the plaintiff. Between the time he made his will and his death the testator not only had made no change whatever in respect to his ownership of Tusculum, but the courts had made none for him. His

status was exactly the same when he made the will as when he died. He was during all the time in possession of the property, claiming the fee as his own, and doubtless died believing it was his without encumbrance. The will was made 11 October, 1901, and testator died 1 January, 1905. The contract of sale to P. G. Alston was made 5 December, 1898, and upon its face expired 1 October, 1899. The suit to enforce the contract was begun after the testator's death and against his heirs, and the decree of the Court is based upon findings of fact as to what transpired between the testator and Alston, but the facts in the record show that the testator repudiated the contract during his lifetime and refused voluntarily to perform it. There is not a word or act of his from which an intention can be inferred to revoke, cancel or change the legacy bequeathed to plaintiff. On the contrary, she received it on the death of testator in exactly the legal form in which he owned it at the time he made his will. This brings the case squarely within the authority relied on by appellants' counsel, who quote from a learned author, viz.: "By its very nature as the gift of a specific, identified thing, operating as the mere gratuitous transfer of the thing without any executory obligation resting on the testator or his personal representative, it follows that unless the very thing bequeathed is in existence at the death of the testator, and then forms a part of his estate, the legacy is wholly inoperative." Pomeroy Eq. Jur., sec. 1131.

The very interest which the testator owned at the date of his will passed unchanged at his death to his legatees, unmodified by his own acts or by any legal decree that had then been made. The very thing devised remained in exactly the same condition at the time of the testator's death as it was in when he made his will, and he never in his lifetime made or consented to any change in it. The doctrine is well illustrated by the other authority (*Chambers v. Kerns*, 59 N. C., 280) cited by appellants' counsel. In that case the

devisor, *after* making his will devising the land to A, sold it to B, taking B's note and giving him a bond to make title. Here was a clear conversion, and in effect a revocation of the will. The Court says, however, even then the result would have been otherwise had his intention not to revoke been manifested by a codicil. The foregoing case is where there is nothing in the will but a devise of the bare land, but the doctrine is that even where there has been a technical conversion, it will not defeat the intention of the devisor that the proceeds or all that belongs to it shall go to the devisee. In the present case there is a manifest purpose that the devisee shall have, not the land merely, but every "right, title and interest therein" and "all its belongings." Judge Redfield says (2 Redfield on Wills, p. 339): "It has ever been held that the term 'personal estates' in a will may have the effect to pass real property, where it is manifest from the whole instrument that such was the testator's intention." This shows that the *intention* governs. The same author says, in Vol. II, p. 346: "It seems to have been supposed that a devise of an estate by name which the testator had contracted to sell would only pass the legal estate for the purpose of enabling the devisee to carry the contract into effect. *Knolys v. Shepherd,* cited by the Master of Rolls in *Wall v. Bright,* 1 J. & W., 499. In this case the Lord Chancellor thought the purchase money would not pass under the devise, but unless there was some special reason leading to that conclusion it would seem natural to conclude this would be the purpose of such a devise. It ought to be construed a devise of estate subject to a contract, and of the price, when that came into the place of the estate."

In speaking of the effect of the voluntary alteration of the estate, after the making of the will, *Lord Mansfield* said that the doctrine had been carried to an "absurd extent," and adds that the alteration must have been a "material one,"

and concludes that "all that is requisite is that the testator shall at the time of his death be seized of substantially the same estate of which he was seized at the time of making the will." Vol. II, *supra,* p. 345.

Upon a review of the case, we agree with the court below that the plaintiff is entitled to receive the proceeds of the sale of the Tusculum property paid by Alston under the contract of sale and now in the hands of the executors. His Honor deducted the costs and expenses of the Alston suit, but, as plaintiff did not except and appeal, this point is not before us.

The judgment of the Superior Court is

Affirmed.

W. T. HUDNELL ET AL. v. L. G. DANIELS ET AL.

(Filed 16 September, 1908.)

ACTION heard before *Lyon, J.,* and a jury, at May Term, 1908, of BEAUFORT.

Defendants appealed.

Small, McLean & McMullen for plaintiffs.

Ward & Grimes and *Simmons, Ward & Allen* for defendants.

PER CURIAM: The Court, having carefully examined the record in this case and given it full consideration, finds that the questions presented are largely of fact, and is of opinion that no reversible error appears in the rulings of the Superior Court necessitating, in the interest of substantial justice, a new trial.

No Error.

STRAUS, GUNST & CO. v. T. O. SPARROW & CO.

(Filed 16 September, 1908.)

1. **Partnership—Retirement of Partner—Notice.**

In order for an ostensible or known partner retiring from a firm to escape future liability as a member thereof to a creditor who advances credit to the partnership, actual notice of the retirement must be given, or the existence of such facts must be brought home to the creditor as would put a person of reasonable business prudence on such inquiry as would lead to knowledge of the dissolution or the retirement of the partner.

2. **Same—Questions for Jury.**

Upon the question of notice to a creditor of a partnership, residing at a distance, of the retirement from the firm of one of the partners, whereon depends the liability of the retiring partner for a debt subsequently contracted with the creditor by the partnership, publication of notice in a local paper is not as a rule recognized as sufficient; but when it is further shown in evidence that notice was thus published for sixty days, and that a copy containing the publication was sent to the creditor, these additional facts, while not conclusive, would present a case for the consideration of the jury on the question of notice.

3. **Partnership—Retirement of Partner—Notice—Principal and Agent—Knowledge of Agent.**

Knowledge of the agent of facts relating to matters within the scope of his agency is knowledge of the principle; and when a sales and collection agent has been informed of the retirement of a partner from the firm, and thereafter at any time advances credit to the partnership, the retired partner is relieved of liability therefor. (*Cowan v. Roberts*, 133 N. C., 629, cited and distinguished.)

ACTION tried on appeal from a justice's court, before *Cook, J.*, and a jury, at April Term, 1908, of BEAUFORT.

The evidence tended to show that plaintiffs, distillers and liquor dealers, in Richmond, Va., sold whiskeys on running account to T. O. Sparrow & Co., a firm doing business in Washington, N. C., from January, 1905, to 6 October of the same year, the balance due being $99.08; that the firm of T. O. Sparrow & Co., composed originally of T. O. Sparrow and defendant W. H. Albert, was dissolved in July, 1905,

when W. H. Albert retired, having sold out his interest to one C. H. Spears, and that defendants T. O. Sparrow and C. H. Spears, the purchaser of Albert's interest, continued to do business under the firm name of T. O. Sparrow & Co

At the time the original firm of Sparrow & Co. was dissolved by sale and transfer of Albert's interest to Spears there was nothing due from this firm to plaintiffs, and the amount now sued for and remaining due was for items sold by plaintiff firm to Sparrow & Co. on 6 October, 1905, all former items of charge having been paid by credits duly entered on the account. The question in debate was as to the liability of W. H. Albert for the debt of defendants, and whether sufficient notice had been given plaintiffs of Albert's retirement from the firm. On issues submitted, verdict was rendered as follows:

1. "Was the partnership composed of T. O. Sparrow and W. H. Albert dissolved on or about 12 July, 1905, as alleged?" Answer: "Yes."

2. "Were the plaintiffs duly notified of such dissolution?" Answer: "Yes."

There was judgment on the verdict in favor of defendant Albert, and plaintiffs excepted and appealed.

W. C. Rodman for plaintiffs.

Small, McLean & McMullen for defendants.

HOKE, J., after stating the case: It is well established that when an ostensible or known partner retires from a firm which continues the business, in order to protect him from liability for future obligations of the partnership proper notice of his retirement must be given. Ordinarily, when a creditor seeking to enforce recovery against such a partner has never had any dealings with the firm, a notice published in a local paper having a general circulation, in a full and proper manner and for a reasonable length of time, will be regarded as sufficient. Where, however, the creditor

claimant has been a customer of the firm, actual notice must be shown or the existence of such facts brought home to the creditor as would put a person of reasonable business prudence on inquiry which would lead to knowledge of the dissolution of the firm or the retirement of the partner resisting the claim. In such case, and particularly when a former customer is resident in a distant community, publication of notice in a local paper is not as a rule recognized as sufficient of itself to affect the customer with notice or to carry the question to a jury, unless it can be further shown that the creditor was in the habit of reading the paper at the time a proper publication was being made, or that a copy of same containing the publication was especially sent to him. These additional facts, while not conclusive, would present a case from which the jury would be required to consider and determine the question of notice.

This general statement, for the most part elementary in its nature, will find support in the text-books (George on Partnership, pp. 259-261; Story on Partnership, Gray's Edition, sec. 161; Strong on Every-day Laws, sec. 267; Lindley on Partnership (1888), marginal, pp. 218-220), and is in accord with our own decisions on the subject. *Ellison & Harvey v. Sexton*, 105 N. C., 356; *Scheiffelin, Hains & Co. v. Stevens*, 60 N. C., 106. And, applying the principles expressed to the facts presented here, we are of opinion that no error has been committed which gives the plaintiffs any just ground of complaint.

There was testimony to the effect that W. H. Albert retired from the firm of T. O. Sparrow & Co. in July, 1905—about the 13th of the month—selling his interest to C. H. Spears, and at the time the firm owed plaintiffs nothing; that formal notice of this dissolution and change was published in a local paper for sixty days, and that this notice was inserted in not less than thirty editions of the paper; and, further, that a copy of the paper containing the notice

was folded in a wrapper, addressed to plaintiff firm at Richmond, and regularly mailed, postage paid.

There was further testimony to the effect that in August or September, 1905, one Henry Gunst, a salesman for plaintiff firm, who had traveled in this section for several years, selling liquors and collecting for them, was in the place of business of T. O. Sparrow & Co., and that Sparrow and Spears and W. H. Albert were present, and at that time W. H. Albert told Henry Gunst, plaintiffs' salesman and agent, that he had sold out his interest in the firm to Spears, and had nothing further to do with the business, and Spears was then and there introduced as Sparrow's partner; and, further, at this time, which was about 1 September, Gunst sold for plaintiffs to the new firm a bill of goods, which was paid for, and later this present sale was made by plaintiffs to Sparrow & Co. While, as stated, the authorities are to the effect that actual notice is required in the case of a former customer of the firm, certainly one who has formerly extended it credit, they also hold that this notice is not required to be in any special or formal manner, and this, like other knowledge, will be at times imputed to the creditor. There was testimony to the effect that plaintiff's salesman and agent, in the present discharge of his duty and within the scope of his agency, was expressly notified that the firm of Sparrow & Co., as formerly constituted, had been dissolved and that W. H. Albert had retired from the business, and under the general principles of the law of agency this knowledge of their salesman was the knowledge of the firm. Reinhardt on Agency, sec. 354; Mechem on Agency, sec. 721. And, while the goods sold at the time when this information was given were paid for, and the present demand is for another and later sale, it is not open to the plaintiff firm to repudiate the knowledge obtained by their agent in the course and scope of his duties, and charge

defendant for a debt which he had not contracted and for which he was not otherwise liable. Such a position would require that a new notice should be given whenever a creditor firm saw proper to change its salesman, and it would well-nigh establish the doctrine that once a partner, always a partner, for it would be very difficult, if not impossible, for a member to retire from a firm so as to protect himself from future liability.

The question has been considered and decided in the case of *Cox v. Pearce,* 112 N. Y., 637; 3 L. R. A., p. 563. In that case it was held:

"1. The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal, but as notice to the principal it has the same effect as to third persons as though his duty had been faithfully performed.

"2. If a person gives notice of his withdrawal from a firm to an agent with authority to receive orders for an article, when the latter seeks from him, as a supposed partner, an order from the firm for such article, it is of no consequence, so far as the effect of the notice is concerned, that on a subsequent sale to a new firm of the same name the agent had forgotten the notice.

"3. Notice to a party, actual or constructive, in a particular transaction of a fact which exempts another from liability in that transaction is notice in all subsequent transactions of the same character between the same parties."

The Judge below, therefore, could well charge the jury that, if they found the facts to be as testified to by the witnesses, they would answer the second issue "Yes." We do not understand that the principle applied in the case of *Cowan v. Roberts,* 133 N. C., 629, to which we were referred by plaintiffs' counsel, militates in any way against

the disposition we make of the present appeal. That case only held that notice given to an employee or bookkeeper in the home office of a creditor firm of the retirement of a certain partner was not sufficient unless it was shown that the employee had something to do with the credit department of the creditor firm. The decision, while eminently sound in principle, goes very far, certainly on the facts of that particular case, in upholding a demand against a retired partner, but in no aspect of the decision, as we understand it, does it sustain the position of defendants here; for, according to this testimony, the agent who was notified of the retirement of defendant Albert was at the time and had been for several years the recognized agent of plaintiff firm, selling goods and collecting debts for them throughout this section, and so came directly within the principle applied in *Cowan v. Roberts.* He was connected with the credit department at the time the notice was given and received.

There is no error, and the judgment below will be affirmed.

No Error.

MARY H. HARRISON v. J. A. BRYAN AND THE CITY OF NEW BERN ET AL.

(Filed 16 September, 1908.)

Injunction—Cause of Action Removed—Appeal Dismissed Without Prejudice.

When it has been made to appear that the action is for injunctive relief only, and the cause has been removed, appeal will be dismissed without prejudice to the rights of plaintiff to sue for damages, if so desired.

ACTION to enjoin the cutting and removing of a tree, heard before *Guion, J.*, at Fall Term, 1908, of CRAVEN.

Plaintiff appealed.

D. E. Hendren and *G. V. Cooper* for plaintiff.

W. W. Clark and *W. D. McIver* for defendants.

PER CURIAM: It appearing to the Court, upon affidavit of defendant, which is not contradicted, that since the dissolution of the restraining order in this case by his Honor, *Judge Guion,* and pending this appeal, the tree described in the pleading has been cut down by the city authorities of New Bern, and that there is nothing now to enjoin, and this being an action for injunctive relief only, it is ordered that the action be dismissed without prejudice to any rights the plaintiff may have to commence another action for damages, is so desired.

Action Dismissed.

EUREKA LUMBER CO. v. J. L. SATCHWELL ET AL.*

(Filed 16 September, 1908.)

Mortgagor and Mortgagee — Assignee of Bond — Coprincipals — Debtor and Creditor—Subrogation and Contribution—Restraining Orders—Questions for Jury.

E. and W. executed their bond to S., secured by mortgage on two tracts of land held by each in severalty, which was subsequently assigned to defendant. W. conveyed his tract to plaintiff, and it was sold under foreclosure and purchased by defendant G. The plaintiff obtained a restraining order to prevent payment of the purchase price and completion of sale, on the ground that E. and W. were coprincipals, and that, as W. was insolvent, plaintiff was entitled to be subrogated to his rights, and contribution against E.: *Held*, (1) contribution can arise only after payment by one of the debtors; (2) whether W. can recover out of E. is a question for the jury; (3) the mortgagee or the assignee of the bond cannot be required to defer collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves; (4) the restraining order was properly dissolved.

ACTION heard by *Lyon, J.*, on petition to dismiss a restraining order, May Term, 1908, of BEAUFORT.

Plaintiff appealed.

Wiley C. Rodman for plaintiff.

Small, McLean & McMullen for defendants.

CLARK, C. J. On 5 May, 1905, Elijah Sheppard and H. A. Windley executed their bond for $220 to defendant Satchwell, and to secure the same executed a mortgage upon twenty-five acres of land belonging to Sheppard and sixty acres of land, the property of Windley, who has since conveyed his tract to the plaintiff. The bond has since been assigned to the defendant McLean. The sixty-acre tract has been sold under the power of sale in the mortgage, and the defendant W. D. Grimes became the purchaser. There was a restraining order granted to prevent payment over of purchase money and completion of the sale, on the ground that

*BROWN, J., did not sit on the hearing of this case.

Windley and Sheppard were coprincipals, and that, Windley being insolvent, the plaintiff is entitled to be subrogated to his rights to contribution against Sheppard.

The defendants contend that Sheppard was surety for Windley and that the latter's property ought to be subjected first. On the face of the mortgage (the bond was not put in evidence) they were coprincipals, and there is no evidence to the contrary. But however that may be, taking it most strongly for the plaintiff that Windley and Sheppard were coprincipals, the Judge properly dissolved the restraining order. The right of contribution can arise only after payment by one of the debtors. Then, whether Windley can recover contribution out of Sheppard will depend upon the finding of a jury whether Sheppard was surety or coprincipal. We need not pass upon the question whether the plaintiff, as purchaser of the property, is subrogated to Windley's right to contribution, if any he has. The mortgagee or the assignee of the bond cannot be required to defer the collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves.

The plaintiff further contends that the mortgage was indexed only in the name of Sheppard, and that therefore it obtained a good title. "The filing of the deed for registration is in itself constructive notice; hence the failure of the Register of Deeds to index it after registration cannot impair its efficacy." *Davis v. Whitaker,* 114 N. C., 279. This case draws the distinction between failure to index a judgment and to index a conveyance, and was approved in *Glanton v. Jacobs,* 117 N. C., 429. If the mortgage, duly filed, was not properly indexed, the fault is not that of the mortgagee, but of the Register of Deeds. What remedy, if any, the plaintiff has against the latter is a question which does not arise in this case.

The judgment dissolving the restraining order is

Affirmed.

N. C. HUGHES ET AL. v. E. R. CROOKER.

(Filed 16 September, 1908.)

1. Contracts—Conditions Precedent—Parol Evidence.

When a promissory note is given in pursuance of the terms of a written contract, evidence can be introduced of a contemporaneous oral agreement, made as a part thereof, to the effect that the note and contract were executed and given upon a condition precedent to their validity, which has not been performed. This does not vary by parol the terms of the written instrument, but postpones its operation until the happening of the contingency.

2. Same—Evidence, Sufficient.

When the defense, in a suit upon a written instrument, is made that it was agreed by plaintiffs' agent that the transaction was incomplete until the agent had done a certain specified service, evidence that the agent told defendant that he was absolutely safe, for the contract was not to be regarded as finished until he, the defendant, signed his satisfaction thereon, which was to be upon the performance of the condition, is sufficient upon the question as to whether the contract was made upon that condition.

3. Contracts—Conditions Precedent, Breach of—Negotiable Instruments—Payment of Note—Measure of Damages.

A holder of a negotiable instrument who has violated his agreement with the maker by negotiating it without performing a condition precedent to its validity is liable to the maker in such sum as he may have lawfully been compelled to pay thereon to an innocent purchaser for value without notice.

ACTION tried before *O. H. Allen, J.*, and a jury, at December Term, 1907, of BEAUFORT.

This action is prosecuted by N. C. Hughes against defendant for the purpose of recovering the amount paid by him by reason of the wrongful and fraudulent negotiation of certain notes executed by him and delivered to defendant, as the plaintiffs allege, to be held until the performance of a collateral contract by defendant. The basis of the complaint, eliminating irrelevant matter, is: That defendant, as agent of a clothes washer company, of Lauderdale,

Miss., proposed to sell to the two sons of the plaintiff Hughes for the sum of $500 certain rights, within a prescribed territory, to sell and appoint subagents to sell the washing machines. Defendant, as an inducement to procure the plaintiff Hughes to sign notes for the purchase price and to secure the payment thereof by mortgage on his land, promised to train the sons in regard to making sales, etc., and that, until he had complied with his contract, and plaintiff or his sons signed a certain paper which defendant exhibited to them at the time the notes were signed, the transaction was to be incomplete and open; that defendant failed and refused to comply with the contract in regard to training the plaintiff's sons, and, in violation of said contract, negotiated the plaintiff's notes to purchasers for value, without notice of the condition upon which they were to become binding upon plaintiff; that by reason of the conduct of defendant in the premises plaintiff was compelled to pay said notes to the purchaser, and was thereby endamaged to the amount of the notes. Defendant, by appropriate pleadings, denied so much of the complaint as was material to the alleged cause of action.

The following issues were, without objection, submitted to the jury:

1. "Did the defendant wrongfully and fraudulently negotiate the notes of the plaintiff N. C. Hughes, as alleged in the complaint?" Answer: "Yes."

2. "What amount, if anything, is the defendant indebted to plaintiff N. C. Hughes by reason thereof?" Answer: "Five hundred dollars."

A large number of exceptions were "lodged" in the progress of the trial, but many of them, involving the same questions, were not referred to in the brief. Those which are material to the decision of the appeal are referred to in the opinion. There was judgment for plaintiffs, and defendant appealed.

Ward & Grimes for plaintiffs.
W. C. Rodman for defendant.

CONNOR, J. The exceptions to the admission of testimony are based upon the theory that the plaintiff is endeavoring to contradict the written contract. This is a misapprehension. The cause of action in no way draws into question the terms and provisions of the notes or the contract made between the sons of the plaintiff and the washer company. The basis of plaintiff's complaint is that, collateral to the written or printed parts of the transaction and as an inducement to the signing of them, the defendant agreed that he would perform certain obligations in regard to training the purchasers in the handling and selling of the machines and right to act as agent, etc., and that until the plaintiff, or his sons, to whom the sale was made, should sign a paper, which he produced at the time, signifying that he had performed his obligation, the entire transaction was *in fieri*, or, in the language of the plaintiff, "unfinished until I signed my satisfaction." That such collateral agreements are enforcible and may be proven by parol, notwithstanding the rule excluding parol evidence to contradict or vary the terms of a contract reduced to writing, has been frequently decided by this and other courts. The latest case in which the principle was enforced is *Pratt v. Chaffin*, 136 N. C., 350. Then the written order for certain goods was signed with a collateral parol agreement that it should not be binding until approved by one of the partners. An action was brought to enforce payment for the goods, which were shipped, but not accepted. The same objection was made to the introduction of evidence of the parol collateral agreement, as here. We do not think it necessary to repeat what was said in that case or do more than refer to the authorities cited. The language of *Shepherd, C. J.*, quoted from *Kelly v. Oliver,* 113 N. C., 442, so clearly and accurately states the principle upon which plaintiff's

case and the admissibility of his testimony rest that we could add nothing of value to it. He says: "This does not contradict the terms of the writing, but amounts to a collateral agreement postponing its legal operation until the happening of the contingency." *Aden v. Doub,* 146 N. C., 10. The testimony was clearly competent. The defendant, at the conclusion of the evidence, moved for judgment of nonsuit and, by several prayers for instruction, presented the contention that in no aspect of the evidence was plaintiff entitled to recover. We think that there is evidence competent to be considered by the jury to sustain plaintiff's allegation. He testified: "I can't say definitely whether or not he said he would not negotiate the notes, but I can say that he said I was absolutely safe, for the contract was not finished until I signed my satisfaction; that there was no finishing of the contract and that was my security. He said: 'This contract that we work under obliges every agent in engaging a subagent to promise him that before he will leave him he signs a contract saying he is satisfied. Now,' he says, 'that is your security,' and then he produces a written blank saying something, I don't remember what. He said he could not leave me; that the contract obliged him, before I sold five machines, because he was not allowed to do it, and then he says: 'I cannot leave you until you say that you are satisfied.' He showed at that time a blank paper to be signed when the work was done." There was much other testimony on the part of the plaintiff to the same effect. Defendant did not testify.

It was not denied that defendant negotiated the notes or that they were paid by plaintiff. His Honor instructed the jury in every phase of the case, putting his instructions in writing. The jury having found that the plaintiff's testimony was true, it was manifest that defendant was guilty of a breach of his contract in negotiating the notes before

he had trained the sons and plaintiff had signed the paper expressing his satisfaction. This was a condition precedent to the validity or closing of the transaction. Plaintiff was negligent in trusting the negotiable notes in the custody of defendant until he had complied with his agreement. He has paid for such negligence and is entitled to be reimbursed by the wrongdoer. While the mere breach of such a contract may not be a fraud, when, as in this case, under the charge of his Honor, the jury, upon considering the circumstances and conditions surrounding the transaction, find that the defendant did not intend at the time he made the contract to perform his promise, his conduct in negotiating the notes, being a nonresident, and taking the proceeds out of the State, justify the verdict of the jury. It is difficult to understand, in the light of the experience as shown by numerous decisions of this Court, why men will make such contracts. The only way, it seems, to protect them against their folly is to demand fair, open dealing on the part of nomadic salesmen of patent rights. There is but little substantial difference between plaintiff's case and many others in which overcredulous citizens, thinking that there were "millions in it," have found that the amount invested in the purchase of patent rights measured the extent of their loss. Eliminating the element of fraud, the allegations and proof are sufficient to sustain the verdict and judgment, upon the theory that the plaintiff had not, until the performance by the defendant of his obligation, come under an absolute liability to defendant. That defendant could not have recovered on the notes at the time he negotiated them is manifest. If by negotiating them he imposed an obligation on the plaintiff to the purchaser, it is equally manifest that he is liable for such amount as plaintiff was thereby required to pay. Any other conclusion would put a premium upon the violation of duty by defendant, to his enrichment and plaintiff's loss. Taking the

evidence to be true as found by the jury, there can be no doubt that a wrong has been done by the defendant to the plaintiff, for which the law will afford him a remedy. The case was fairly submitted to the jury by his Honor, and we find no error in the judgment based upon the verdict.

No Error.

W. D. ROBERTSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 September, 1908.)

1. **Penalty Statutes—Carriers of Goods—Benefit of Shipper—Party Aggrieved.**

   When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under Revisal, sec. 2632, and the proper party plaintiff. Revisal, sec. 400.

2. **Penalty Statutes—Carriers of Goods—Suit for Damages and Penalty—Joinder of Action—Contract—Merger.**

   An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay given by Revisal, sec. 2632, do not merge into each other. They arise on contract and may be joined in the same action. Revisal, sec. 2634.

3. **Penalty Statutes—Carriers of Goods—Defense—Burden of Proof—Evidence.**

   The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by Revisal, sec. 2632, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed."

4. **Penalty Statutes—Carriers of Goods—Action for Penalty, Form of.**

   Under Revisal, sec. 2632, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, that would be a mere informality, which could be remedied by amendment.

ACTION heard by *W. R. Allen, J.*, who found the facts, by consent, at November Term, 1907, of BERTIE.

Defendant appealed.

Winston & Matthews for plaintiff.

Shepherd & Shepherd and *Pruden & Pruden* for defendant.

CLARK, C. J. The plaintiff shipped a box of tobacco from Colerain, in Bertie County, to Gravely's warehouse, at Rocky Mount, N. C., to be sold for shipper's benefit, taking a through bill of lading. The tobacco was delivered by the first carrier, the Navigation Company, to the other defendant, the Atlantic Coast Line, at Tunis, N. C., on 20 October, 1906, and was placed by it in one of its cars. The tobacco was never delivered. The Judge, who found the facts by consent, finds "that search has been made for said tobacco, but there is no evidence that any one has seen it since its delivery to said railroad company, 20 October, 1906, and no evidence that it was burnt, stolen or destroyed."

This action was brought to recover the value of the tobacco and the penalty for thirty days' unreasonable delay. It appeared in evidence that the defendant railroad company had paid the consignee the value of the tobacco since suit brought. Upon the evidence the court rendered no judgment against the Navigation Company for the value of the tobacco, but entered judgment against the railroad company for $85, the penalty for thirty days' unreasonable delay allowed by Revisal, sec. 2632.

The consignor, being the sole party in interest, was the proper plaintiff (Revisal, sec. 400; *Rollins v. Railroad*, 146 N. C., 153), in which case the plaintiff shipped the goods, as here, to be sold for his benefit.

The plaintiff had the right to recover the penalty for delay and also the value of the goods, if not delivered. Both causes of action arise on contract, and they can be joined in the same action. Revisal, sec. 2634. This would be so without the statutory provision. In *Meredith v. Railroad*, 137 N. C., 478, the plaintiff recovered for partial loss of the

goods and for the penalty for delay. One does not merge the other. If it did, in some cases it would be an absolute profit to the carrier to withhold the goods and pay the penalty. In others, as in this case, it could save money and deprive the shipper of the protection of the statute by paying the value of the goods instead of the penalty imposed by the statute. This would be a virtual repeal of the statute as to all small shipments, though they need its protection the most.

When without its default the goods are not delivered, as where they are "burned, stolen or destroyed," the law justly relieves the carrier from the penalty. But this is a defense, and the burden is on the carrier to prove it. Mere proof of loss raises a presumption of negligence. It does not at the same time negative this by raising a presumption that the goods were burned or destroyed or that they were stolen, but throws the burden of proving those matters upon the defendant, if it seeks to excuse itself. It is true the defendant did not put any witness on the stand to prove that the goods had been seen since they were put in the car, and it is not likely that it would. The plaintiff could hardly be able to do so. The tobacco was not necessarily or presumptively, therefore, burned or destroyed or stolen. It may, and probably was, negligently missent to some other of the hundreds of stations of the defendant, the Coast Line system, where it may now be lying, or it may have been negligently placed in one of the cars sent out from Tunis to distant points on other lines in other States. Wherever it may be, it is now the property of the railroad company, which has paid for it.

The Judge states that "search has been made," but he does not say how thorough it was, nor when and where made. It is not probable that such search was made at all points to which the tobacco could have been missent. There was "no evidence," the learned Judge says, "that it was burnt,

stolen or destroyed." The mere fact that the goods are missing or their present whereabouts is unknown to the carrier, which at common law is an insurer of their safe conveyance and delivery, cannot raise a presumption of a state of facts that would excuse its failure to deliver in a reasonable time. There must be evidence tending to show burning, destruction or theft. The Judge not only does not find such defense proven, but finds that there was no evidence of it.

In *Thompson v. Express Co.,* 147 N. C., 343, where the findings of fact were identical with those in this case, this Court, speaking through *Brown, J.,* "found no error" and sustained the same verdict of $85 for the thirty days' penalty, but gave a partial new trial, on the issue as to the $50 penalty for not auditing and settling the claim for the goods lost in sixty days, because the claim was not filed in writing.

The defendant further moves to dismiss in this Court because the action is not brought "on relation of the State." Revisal, sec. 2632, does not require this formality, but gives the action directly to "the party aggrieved," thus taking it even out of the permissive authority to use the name of the State, given by Revisal, sec. 2647. *Carter v. Railroad,* 126 N. C., 444, and cases there cited. Even if it were otherwise, and it had been required to bring the action "on relation of the State," the case would not be dismissed, either in the court below or in this Court, for such mere informality, but an amendment would be allowed. *Harcum v. Marsh,* 130 N. C., 154; *Wilson v. Pearson,* 102 N. C., 318; *Grant v. Rogers,* 94 N. C., 760; *Forte v. Boone,* 114 N. C., 177, and cases there cited.

Affirmed.

T. L. EMRY v. EDWARD CHAPPELL.

(Filed 16 September, 1908.)

1. Plea in Abatement—Nature of Plea.

In pleas in abatement the facts upon which the plea rests must be stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted.

2. Same, Effect of.

An abatement of a suit is a complete termination of it at law, and the abatement of the main action abates proceedings ancillary or collateral to it.

3. Pleas in Abatement—Relief in Former Action, When Granted.

When it appears that in a former suit pending between the parties the same relief can be afforded as in the present action, the latter action should be dismissed; and it is immaterial what the position of the respective parties on the record in the two suits may be, whether plaintiffs or defendants, if full relief can be had in the action first commenced.

4. Same—Partnership—Dissolution.

In an action by one partner for dissolution of the partnership, on the grounds that he had been denied participation in the profits, and his partner was mismanaging the firm's affairs and converting its assets to his own use, the answer of the other partner alleged the pendency of a prior action against the firm, brought by a creditor of the firm, in which, by answer, he in effect demanded an accounting and dissolution and division of the surplus. All the parties to the former action agreed to a reference, including the taking and stating of an account between the defendants therein, with leave to file and amend pleadings, etc. In the present suit the Judge in the lower court passed upon the answer and evidence in the former suit, and found them to be as stated: *Held*, (1) the plea of former suit by answer in this action was a proper plea; (2) the plaintiff in this action can obtain the same relief in the former action, and have the necessary ancillary remedies which may be required to protect his interests pending the litigation, by proper application to the court; (3) it was error in the lower court to overrule the defendant's motion to dismiss in this action.

5. Plea in Abatement—Action Dismissed—Discretionary Powers of Trial Judge.

When in an action there is a plea of a former action, wherein the full relief demanded can be had, it is in the discretion of the trial Judge to stay further proceedings in the present action

until an opportunity is given to correct the record in the former suit, so as to embrace further matters set out in the present suit, or he may dismiss, and require plaintiff to start anew after having the record in the other suit amended.

ACTION heard at chambers, at Kinston, LENOIR County, by *O. H. Allen, J.*, 20 May, 1908.

This is an action for the dissolution of the partnership of Emry & Chappell and for a settlement of its affairs. The plaintiff also asks for an injunction and a receiver to protect the partnership assets pending the action. He bases his claim for relief upon the allegations that the defendant and himself have disagreed as partners, that he has been denied any participation in the management of the business and that the defendant is mismanaging the affairs of the firm and converting its assets to his own exclusive use.

The defendant filed an answer, in which he alleges that there is a former suit pending between the Lyon and Montague Company, which is a creditor of the firm, and Emry & Chappell to recover a debt alleged to be due the plaintiff, and that the plaintiff, Emry, can have the same relief in that action as he now demands in this one. In the case of *Lyon & Montague Co. v. Emry & Chappell* the defendants were served with process. The defendant, Emry, did not answer. The defendant, Chappell, answered only for himself, and averred in his original and amended answers that the plaintiff paid to Emry a large amount due the defendants, after notice from the defendant, Chappell, not to do so, as Emry had already received a large sum in excess of his share of the partnership assets and was misappropriating the same, the amount so paid being more than sufficient to pay the claim of Lyon & Montague against the defendants, and, further, that the said company was also notified by him to reserve an amount sufficient to pay its claim, which it failed to do. He further substantially alleges against his codefendant, Emry, that the partners had disagreed; that Emry had mismanaged the business and misapplied the as-

sets, converting them to his own use, so that on 1 October, 1906, he was indebted to the firm in the sum of $48,895.69, one-half of which was due to him; that he had demanded a settlement, which Emry refused and then withdrew from active management of the business, leaving him in sole charge, and that upon a settlement Emry will owe him at least $20,000. He demands judgment for a dissolution of the partnership and an accounting of all of the dealings and transactions of the firm; that its property be sold, the debts paid and the surplus divided between the partners according to their several and respective rights. He further prays that a judgment be rendered against Emry for $20,000, the amount due by him to Chappell, the answering defendant. There is a prayer for further relief and costs. The record shows that all the parties agreed to refer the case for the purpose of taking and stating an account between the plaintiffs, Lyon & Montague, and the defendants, Emry & Chappell, and also betwen the defendants themselves, as partners, with leave to Chappell to amend his answer and to Emry to file an answer. The reference was so ordered, with the consent of all the parties.

The Judge passed upon the answer and the evidence of the record in the former suit, which he found as a fact to exist, and, after consideration of the same, refused to sustain the plea in abatement, or answer in the nature of a plea, or to dismiss the action, because the plaintiff could not obtain the same relief in the other action pending in the Superior Court of Nash County as he sought to obtain in this case. The defendant, Chappell, excepted and appealed.

E. L. Travis and *Walter E. Daniel* for plaintiff.

Battle & Cooley and *Bunn & Spruill* for defendant.

WALKER, J., after stating the case: The record shows that the suit of *Emry v. Chappell* was commenced on 6 May, 1908, that being the day on which the summons was delivered

by the Clerk to the Sheriff, as appears by the latter's endorsement on the process. *Smith v. Lumber Co.,* 142 N. C., 26; *Webster v. Sharpe,* 116 N. C., 466. The order of reference in *Lyon & Montague v. Emry & Chappell* was made, with the consent of the parties, on 27 April, 1908. We refer to this matter, as it was contended by the plaintiff's counsel that this action was commenced before the reference was ordered.

Pleas in abatement, being dilatory pleas, are not favored at common law or under The Code, and can be used only to present matter which defeats the present action. If the right of action is denied, the facts upon which the denial rests must be pleaded in bar, but the abatement of a suit is the complete termination of it at law, and the abatement of the main action abates proceedings ancillary or collateral to it. The general principle of the law is that the pendency of a prior suit for the same thing or, as is commonly said, for the same cause of action between the same parties in a court of competent jurisdiction will abate a later suit, because the law abhors a multiplicity of suits and will not permit a debtor or a defendant to be harassed or oppressed by two actions, if even substantially alike, to recover the same demand, when the plaintiff in the second action can have a complete remedy by one of them. 1 Cyc., 20-21; *Alexander v. Norwood,* 118 N. C., 381; *McNeill v. Currie,* 117 N. C., 341; *Harris v. Johnson,* 65 N. C., 478. The principle is based upon the supposition that, if the first suit is so constituted as to be effective and available, and also to afford an ample remedy to the plaintiff in the second, the latter is unnecessary and should be dismissed. *Smith v. Moore,* 79 N. C., 82. The positions of the respective parties on the record in the two suits, whether plaintiffs or defendants, is not material, if full relief can be had in the one first commenced. *Gray v. Railroad,* 77 N. C., 299; *Wallace v. Robinson,* 41 N. H., 286. It is held in *Wallace v. Robinson,*

supra, that, when one partner brings a suit against his copartners for an account, all the parties are to be regarded as actors, and the judgment should settle the partnership concerns between all the partners, as if each was a complainant in a suit against his copartners. In *Crane v. Larsen, supra*, the Court held that The Code allows the fact that there is another action or suit pending between the same parties for the same cause to be pleaded by way of answer, when it does not appear from the face of the complaint, the evident object of this provision being to prevent unnecessary litigation and to avoid a second lawsuit where the identical matter is at issue between the same parties in a former one, and if there were other parties in the first suit not included in the subsequent one it would not necessarily prevent the pendency of the former action from being a defense to the latter, nor would the fact that the parties, plaintiff and defendant, were reversed in the two suits prevent the defense, if the issue in the two were the same, and the same relief attainable.

The only question, therefore, is whether the plaintiff in this action can have the same relief he now seeks in the former suit. We think it clear that he can. The matters involved in the two suits, as between him and his copartner Chappell, are precisely the same and, at least, substantially identical. He can by answer in the former suit obtain the same relief he asks for in this independent action, and he can, also, by proper application to the court, have such ancillary remedies as may be required to protect his interests pending the litigation, if this kind of relief is necessary to complete the identity of the two actions.

It may be that the plaintiff in the former suit was entitled to judgment, notwithstanding the answer by Chappell, Emry having failed to answer, and that Chappell could not litigate partnership controversies, as between him and Emry, in that suit, upon the ground that they do not relate

to and have no connection with the plaintiff's cause of action and constitute no defense thereto, but this matter is not before us. It is a question of pleadings and procedure, and not one of jurisdiction, and if there was any irregularity or defect in the proceedings it was waived by the consent of the parties to the order of reference.

It was stated by counsel at the hearing of this case in this Court that the plaintiff, Emry, had moved in the former action to strike out the reference, for the reason that he had not, in fact, consented to it, and that his motion had not been passed upon. It may be that, by motion in the cause and an amendment of the record, and by proper pleading with reference to the answer of Chappell in the former suit, it may be shown that relief cannot be had therein by the plaintiff in that case. We do not decide this question, as it is not before us. The Judge of the Superior Court may in his discretion stay further action in this case until the plaintiff can have an opportunity to correct the record in the former suit, if it can be corrected so as to avail him in this action, or he may dismiss this case and require the plaintiff to start anew after having the record in the other suit amended. The plaintiff can proceed in the matter as he may be advised. All we decide now is that the court committed an error in overruling the defendant's motion to dismiss, in the present state of the record in the former action, as the plaintiff can have full relief therein.

Error.

EUREKA LUMBER COMPANY v. JOHN R. HARRISON AND J. H. ODEN.

(Filed 16 September, 1908.)

Judgment—Nonsuit—Appeal Dismissed—Action Within One Year.

Where there has been a judgment of nonsuit entered against a plaintiff upon the evidence, and an appeal taken to the Supreme Court which was not duly prosecuted and was dismissed under Rule 17, the judgment in the first action is not a bar to the second one, and the plaintiff may bring another action for the same cause within one year after the appeal in the first action has been dismissed. This is clearly so, if an additional cause of action is stated and no proof taken.

ACTION heard by *Lyon, J.*, at May Term, 1908, of BEAUFORT.

Plaintiff appealed.

Wiley C. Rodman for plaintiff.

No counsel for defendants.

WALKER, J. It appears from the record that the plaintiff brought an action against the defendants for a trespass committed on its land in cutting trees. At the conclusion of the testimony the court, on motion of the defendants, adjudged that a nonsuit be entered against the plaintiff under the statute (Revisal, sec. 539). The plaintiff appealed from this judgment, but the appeal, not having been duly prosecuted, was dismissed in this Court, under Rule 17. The plaintiff then brought this action, for the same trespass, within one year after the other action and the appeal therein had been dismissed. The action was also dismissed in the court below, and the injunction formerly issued was vacated, upon the ground that the nonsuit in the former action was a complete bar to the further prosecution of this action. The question, therefore, is whether a second suit for the same cause of action will lie under such circumstances. We decided in *Hood v. Telegraph Co.*, 135 N. C., 622, where the

same point was presented, that a second action will lie, although a nonsuit had been entered against the plaintiff, on the merits, in a former suit for the same cause of action and upon the same state of facts. This ruling is sustained in the following cases: *Meekins v. Railroad,* 131 N. C., 1; *Prevatt v. Harrelson,* 132 N. C., 250; *Evans v. Alridge,* 133 N. C., 378; *Nunnally v. Railroad,* 134 N. C., 755; *Tussey v. Owen,* 147 N. C., 335; *Henderson v. Eller,* 61 S. E. (N. C.), 446.

We will not discuss the suggestion in the plaintiff's brief that there is an additional cause of action stated in the complaint in this action, as it is not necessary to do so. If that be correct, the ruling of the court was clearly erroneous, no proof having been taken in this case.

There was error in dismissing the action.

Reversed.

JOHN T. SMITH v. CASHIE AND CHOWAN RAILROAD AND LUMBER COMPANY.

(Filed 16 September, 1908.)

1. Appeal and Error—Costs of Superior Court—Final Judgment.

   With but a few exceptions, as, for instance, where continuances are granted upon agreements, or judgment, that a party pay costs, the costs of the Superior Court follow final judgment.

2. Same—Successful Appeal—Costs, an Offset to Final Judgment—Transcript and Certificate.

   When plaintiff recovers final judgment in the Superior Court after two successful appeals by defendant, the costs of all the trials in the Superior Court should be taxed against the defendant, but it is entitled to offset against the final recovery all the costs properly paid by it on its successful appeals, including the transcript and certificates.

MOTION to tax costs, heard by *W. R. Allen, J.*, who found the facts by consent, at November Term, 1907, of BERTIE.

Defendant appealed.

Day, Bell & Dunn and *Murray Allen* for plaintiff.
Winston & Matthews and *St. Leon Scull* for defendant.

CLARK, C. J. This case has been here twice before upon the defendant's appeal (140 N. C., 375, and 142 N. C., 26). On this last (third) trial below the plaintiff again recovered judgment, and the defendant sought to offset against the recovery the costs it had paid in the Superior Court on the two former trials, whose results had been corrected on appeal, especially the costs paid the Clerk for making out the transcripts for those appeals. In effect, the defendant moved to tax the costs of those trials and of the transcripts thereof against the plaintiff.

The court properly refused to grant the motion as to the costs of the Superior Court on the two former trials. "The costs (of the trial court) follow the result of the final judgment." *Williams v. Hughes,* 139 N. C., 19, citing *State v. Horne,* 119 N. C., 853; *Kincaid v. Graham,* 92 N. C., 154. With a few exceptional instances (set out in *Dobson v. Railroad,* 133 N. C., 624), the party who recovers final judgment in the trial court recovers all the costs of that court. It is true that the costs of transcript and certificate are not part of the costs of this Court. *Roberts v. Lewald,* 108 N. C., 405. Yet it is said in *Dobson v. Railroad, supra,* that "they are a part of the necessary costs of the appeal, and not strictly costs of the Superior Court incident to the trial and procedure in that court. Hence the successful appellant who has paid them is entitled to recover them from the appellee, and * * * they are not recoverable back in the final judgment, should it go in favor of the opposite party. The Code, sec. 540."

It follows that, if the defendant did not actually recover the costs of transcripts and certificates paid by it on the two former successful appeals, it is entitled to have those sums deducted from the costs now taxed against it in favor of the plaintiff. Such costs are like the costs of this Court

on said appeal, which, paid by the unsuccessful plaintiff-appellee, cannot be recovered back by him, though he now recovers final judgment in the controversy. Indeed, the costs of defendant in the two appeals had not been actually paid by plaintiff, but the Judge properly allowed them to be deducted from the plaintiff's judgment.

The judgment is

Modified and Affirmed.

B. R. GAY v. ROANOKE RAILROAD AND LUMBER COMPANY ET AL.

(Filed 23 September, 1908.)

1. Trespass—Question of Ownership—Evidence.

In an action for damages arising upon the alleged negligence of defendant, through which the timber, etc., upon plaintiff's lands, consisting of several tracts, was burned, it was admitted in open court that the plaintiff was the owner and in possession of the land upon which the traspass was alleged to have been committed: *Held*, it was competent upon cross-examination for defendant's counsel to ask the plaintiff, a witness in his own behalf, if a certain tract of the land was not owned by some one else at the time of the fire, as tending to show that he had sold it, and thereby impeach his estimate of the damage he had testified to on his direct examination.

2. Contracts, Interpretation of—Independent Contractor—Evidence.

When a party defendant aptly sets up the defense of independent contractor in relation to his codefendant, and the only evidence thereof is a written contract to that effect, free from ambiguity, the interpretation of the contract involves questions of law alone, and it is error for the trial Judge to charge the jury that the paper-writing does not establish the relation of independent contractor, but they can consider it in finding whether such relationship exists.

3. Same.

When, under a lawful and clearly expressed contract, one party employs another to do a certain work for him without any supervision or control, and the party for whom the work is

done is interested only in its ultimate result, the latter is not liable to third persons in damages for the negligence of the former, provided he has not been negligent in selecting him as a suitable person for the purpose.

HOKE, J., concurring in result.

ACTION tried before *Lyon, J.*, and a jury, at December Term, 1907, of GREENE.

Damages are sought for the burning of timber, etc., upon plaintiff's lands, through the negligence of defendant's agents, employees, etc. Among the defenses set up was that of independent contractor, and during the trial a written contract was introduced in evidence by defendant, as follows:

"This agreement, made this 1 February, 1905, by and between W. R. Jackson and Milton H. Jackson, trading as Jackson Bros., of Lugwell, Pitt County, North Carolina, and the Roanoke Railroad and Lumber Company, of Norfolk, Virginia, a corporation duly organized under the laws of North Carolina, witnesseth:

"That whereas the said Roanoke Railroad and Lumber Company owns certain tracts of timber in Greene and Pitt counties, North Carolina, on the East Carolina Railroad, which timber up to this time has been logged by Surry Parker, of Pine Town, North Carolina, the said Parker owning certain logging equipment, which he has this day sold to the said Jackson Bros., and the said Jackson Bros. being desirous to enter into a contract with the said Roanoke Railroad and Lumber Company for logging said timber: Now, therefore, this agreement witnesseth:

"1. That the said Jackson Bros. agree to cut all of the timber the said Roanoke Railroad and Lumber Company now own or may hereafter purchase, during the existence of this contract, in Pitt and Greene counties, adjacent to the territory which they now own, into saw logs, 16 feet 4 inches, 14 feet 4 inches, and 12 feet 4 inches long, and deliver said

logs over tramroads, built at their own expense, to side tracks along the line of said East Carolina Railroad, and to load same on flat cars furnished for the purpose. The said Jackson Bros. agree to load 20,000 feet per day for each working day until this contract is completed, and to load not less than 3,500 feet of logs, measured by Doyle's rule, on each and every car furnished them, and they are not required to load more than seven cars on any one day.

"3. That said Jackson Bros. agree to cut the timber in proper and workmanlike manner, and as close as the said Roanoke Railroad and Lumber Company may direct, and to cut all and every suitable tree into logs before leaving any one location.

"4. The said Jackson Bros. further agree to load said cars in proper manner, logs being secured to stand transportation by the railroad, and the said loading to be done according to directions as given by the Atlantic Coast Line Railroad Company.

"5. They further agree that they will pay for any delays or damages that may occur to the Atlantic Coast Line Railroad should they fail to load the logs as agreed upon, as per contract between the East Carolina Railroad Company and the Atlantic Coast Line Railroad and the said Roanoke Railroad and Lumber Company, dated the .... day of ....., and which contract is made a part of this agreement, which are such portions of this agreement as may refer to the penalties for not loading cars when set in on sidings for that purpose.

"6. The said Jackson Bros. agree to keep up, at their own expense, in good working order, the locomotive and logging cars furnished them by the said Roanoke Railroad and Lumber Company for the purpose of doing said work; to unload all railroad iron furnished them for the purpose of laying tracks, at their own expense, and, when through with said contract, to take up all of said railroad iron, spikes and

splices and to load them on cars furnished for moving of same, and also return said locomotive and cars, loaded on cars of the Atlantic Coast Line Railroad, when through with them, in good order.

"The Roanoke Railroad and Lumber Company hereby agrees to furnish said Jackson Bros. all the railroad iron and locomotive and logging cars necessary to do this work, and to pay to them the sum of $3 per thousand feet for merchantable logs so cut, hauled and delivered and loaded on cars of the Atlantic Coast Line Railroad, on the side track located for the purpose, and to pay them on the 5th and 20th of each month for the work done. It is further and mutually agreed that all logs loaded on said cars shall be sound and merchantable, and if the said Jackson Bros. shall load any logs not sound and merchantable, then they shall be responsible for all freight and expenses on all such logs; and it is further mutually agreed that all measurements of logs shall be made by Doyle's rule, by a competent log scaler, to be employed by the said Roanoke Railroad and Lumber Company, who shall measure said logs as soon as they arrive at their destination at Pinner's Point, and that a statement of all logs so received shall be made to the said Jackson Bros. twice a month.

"And whereas the said Roanoke Railroad and Lumber Company has this day advanced to said Jackson Bros. the sum of $3,000, to be paid to the said Parker aforesaid for his logging equipment, it is hereby mutually agreed that the said Jackson Bros. shall give to the said Roanoke Railroad and Lumber Company a bill of sale on said property purchased from said Parker, and that the said Roanoke Railroad and Lumber Company shall retain out of the sum of $3, to be paid to Jackson Bros. for each thousand feet of logs delivered the sum of fifty cents, until all of said $3,000, with interest, is paid back to said Roanoke Railroad and Lumber Company; and it is further mutually agreed that, after the

said $3,000 is paid off, said Roanoke Railroad and Lumber Company shall retain the sum of twenty-five cents per thousand feet out of said contract money, until all of this contract is completed and all of the timber owned and hereafter purchased by the said Roanoke Railroad and Lumber Company is logged in accordance with this contract, at the completion of which the said Roanoke Railroad and Lumber Company agrees to pay all of said sum so retained, with interest, to the said Jackson Bros. But it is hereby understood that the said sum to be retained for the faithful performance of this contract shall at no time exceed the sum of $2,000, and all amounts accruing above said sum of $2,000 shall be paid to the said Jackson Bros.

"Witness our hands and seals.

"JACKSON BROS. [Seal.]

"ROANOKE RAILROAD AND LUMBER COMPANY,

"R. S. COHN, *Secretary.* [Seal.]

"Witness as to Jackson Bros.: S. W. CLARKE.

"Witness as to Railroad and Lumber Company: G. R. SIMPSON."

These issues were submitted:

1. "Is the plaintiff the owner and in possession of the land described in the complaint?" Answer: "Yes."

2. "Did defendants Walter and M. H. Jackson negligently kindle the fire that burned the lands of the plaintiff, as alleged in the complaint?" Answer: "Yes."

3. "Did the defendant Roanoke Railroad and Lumber Company, its agents, servants or employees, negligently kindle the fire that burned the lands of the plaintiff, as alleged in the complaint?" Answer: "Yes."

4. "What damage, if any, is the plaintiff entitled to recover in this action?" Answer: "Thirteen hundred dollars."

From the judgment rendered all the defendants appealed.

Wooten & Clark for plaintiff.

Skinner & Whedbee, Moore & Dunn and *Galloway & Albritton* for defendants.

BROWN, J. It is unnecessary to consider all the errors assigned, as they may not arise on another trial. Two errors assigned in the record we think are fatal to the judgment rendered.

1. One of the tracts of land alleged to have been burned over was called the Williams land. The defendants' counsel asked the plaintiff, on cross-examination, if the timber on that land was not owned by some one else at the time of the fire. The question, upon objection by plaintiff, was excluded. In this we think his Honor erred. We suppose the question was excluded upon the idea that defendants were attempting to prove title to land by parol. We do not take that view of it. The record states that the defendants "admitted in open court that the plaintiff was the owner and in possession of the land upon which the trespass was alleged to have been committed." The plaintiff had been examined in his own behalf as to the extent of his damage, and a part of his damage, he claimed, arose from the burning of the timber on the Williams land. On cross-examination it was competent to ask him if some one else did not own the timber on that land—in other words, had he not sold it. It was a direct impeachment of the estimate of damage plaintiff had testified to on his examination in chief. Had the defendants offered parol evidence, by a witness other than the plaintiff, for the purpose of proving a sale of the timber by plaintiff, a different proposition would be involved.

2. It is admitted that the defendant Roanoke Company owned certain timber in Greene and Pitt counties, and that the codefendants Jackson Bros. were cutting and removing it for the company. During the trial a certain contract, dated 1 February, 1905, entered into between the Roanoke Company and Jackson Bros. was put in evidence by defendant

Roanoke Company for the purpose of exonerating them from liability by showing that Jackson Bros. were independent contractors and not its agents. The defendant Roanoke Company moved to nonsuit, and also requested the court to charge the jury: "That upon the evidence in this case the defendants W. R. Jackson and M. H. Jackson were, at the time of the injury alleged in the camp limit, independent contractors in the logging and operating of the railroad, and defendant Roanoke Railroad and Lumber Company would not be in anywise liable for the conduct or act of either of the Jackson Bros. concerning such operation." His Honor refused to give this instruction prayed for, and defendants excepted.

A very careful examination of the record discloses no evidence whatever as to the relation existing between these defendants, except the written contract under consideration, and as to that the court charged: "That the paper-writing introduced by the defendants, termed a contract, between Jackson Bros. and the defendant corporation, does not make Jackson Bros. independent contractors, but you can consider such contract in passing upon the liability of defendant company, as to whether they (Jackson Bros.) were independent contractors." Defendants excepted.

It is patent that, if as matter of law this paper-writing does not make Jackson Bros. independent contractors, as charged, his Honor erred in telling the jury that "You can consider such contract in passing upon the liability of defendant company, as to whether Jackson Bros. were independent contractors"; for it is elementary that where the language of a contract is free from ambiguity its construction is for the court and not for the jury. The ruling of which the Roanoke Company may justly complain, however, is in the construction the Judge himself placed upon the instrument. In our opinion, according to its terms, Jackson Bros. held the relation of independent contractors engaged in the cutting and removal of the timber of the Roanoke Company. There is nothing

in the language of the instrument by which Jackson Bros. are made the servants of the Roanoke Company, employed to superintend the work of cutting and removing the timber. Jackson Bros. come clearly within the recognized definition as to what constitutes an independent contractor. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. Pollock on Torts, 78; Barrow on Neg., 160.

The law is well stated in *Young v. Lumber Co.*, 60 S. E. Rep., 656, a case strikingly like this, and by which it is controlled. *Mr. Justice Connor*, speaking for the Court, says: "When a contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master."

We think the Judge below should have sustained the motion to nonsuit as to the Roanoke Company, and it is so ordered. As to the defendants Jackson Bros., we award a

New Trial.

NATHAN SIMMONS v. THE DEFIANCE BOX COMPANY.

(Filed 23 September, 1908.)

1. **Summons—Judgment—Improper Service—Motion in the Cause.**
   A motion to set aside a judgment for lack of service is the proper procedure, and it is for the court to find the facts and correct the record to speak the truth. If as a fact there was no proper service or appearance, the judgment is void.

2. **Procedure—Motion in the Cause—Direct Proceedings.**
   A motion in the cause, when appropriate, is a direct proceeding.

3. **Corporation—Summons—Service—Foreman—Proper Officer.**
   Service of summons on a foreman of a corporation, who acts under orders of a superintendent who is present at the time, is not upon a person on whom valid service for a corporation can be made.

MOTION by defendant to set aside judgment for want of service, heard by *W. R. Allen, J.*, at February Term, 1908, of CRAVEN.

Motion denied. Plaintiff appealed.

W. D. McIver and *R. A. Nunn* for plaintiff.

H. L. Gibbs and *Simmons, Ward & Allen* for defendant.

CLARK, C. J. Motion to set aside a judgment. The court found as facts: "The summons issued 27 April, 1907. It was read and a copy delivered to S. D. Mesic, at defendant's mill, 4 May, 1907. At that time L. M. Baltes was superintendent and manager of said mill, and Mesic was employed as foreman of the mill, employing and discharging hands under the instruction of the superintendent; he was not an officer of the company (unless the above facts make him such) and had no authority to pay out and receive money on behalf of the defendant. After the officer left, Mesic handed the summons to Baltes, the superintendent, who was advised by counsel that there had been no legal service, and no attention was paid to the action. At October Term, 1907, judgment by default and inquiry was taken. At November

Term the inquiry was executed and judgment final was entered on the verdict. At February Term, 1908, motion was made to set aside the judgment, on the ground that there had been no legal service of the summons upon the defendant company."

The plaintiff moved to dismiss the motion, on the ground that the remedy was by civil action. The motion to dismiss was properly denied. When it is sought to set aside a judgment for fraud, that must be done by an independent action, because it depends upon extraneous facts, which the parties are entitled to have found by a jury. The judgment is not void for fraud, but voidable. On the face of the record it is regular. But when it is sought to set aside a judgment for irregularity, in that there has been no service of summons, it is for the court to find the facts and correct the record to speak the truth, and if in fact there was no service of summons or appearance by the defendant (which would waive service of summons), the judgment is void. *Smathers v. Sprouse,* 144 N. C., 637, and cases there cited. The words used in that case, "direct proceeding," do not mean "an independent action." A motion in the cause, when appropriate, is a direct proceeding. In the well-known case of *Harrison v. Harrison,* 106 N. C., 282, it was held that when there was no service of process the judgment could be set aside by motion in the cause.

"Where it appears from the record that a person was a party to an action, when in fact he was not, the legal presumption that he was a party is conclusive until removed by a *correction of the record itself,* by a direct proceeding for that purpose." *Sumner v. Sessoms,* 94 N. C., 377. This means by motion in the cause, for the court corrects the record to speak the truth. To same purport, *Doyle v. Brown,* 72 N. C., 393, where it is said: "Where the summons was not served on defendant and he did not enter an appearance nor have any knowledge of the action until after default judg-

ment, the judgment is void and will be set aside, *on motion.*" In *Flowers v. King,* 145 N. C., 234, the summons had been served upon another man, who had the same name, and the Court said: "A party in such case is not allowed to seek redress from the action of one court through the conflicting action of another court or *in a different and distinct proceeding* in the same court."

His Honor also correctly held that the "foreman, acting under the directions of the superintendent," is neither "an officer" nor "a managing or local agent" of the company, and hence is not a person upon whom service of summons upon the company could be made. If this were not so, service could be made on the boss spinner or boss weaver of a cotton factory, or the foreman of the round house, or any other foreman of a railroad, acting under orders of a superintendent who is present.

Affirmed.

F. R. GLASCOCK AND WIFE V. T. N. GRAY ET AL.

(Filed 23 September, 1908.)

1. Executors and Administrators—Foreign Executors—Bond—Deeds and Conveyances—Statutory Requirements—Interpretation of Statutes.

Under Revisal, sec. 28, declaring that "no foreign executor has any authority to intermeddle with the estate until he shall have entered into a bond" within a year from the testator's death, deeds made by foreign executors to lands in this State, under a power in the will to sell, convey no title until the statutory requirements have been complied with.

2. Same—Words and Phrases.

The words "intermeddle with the estate," used in Revisal, sec. 28, in relation to the authority of foreign executors in dealing with the testator's property here, signify that foreign executors may not, without giving bond, exercise any control over any part of the estate, real or personal, until the terms of the act are complied with.

GLASCOCK *v.* GRAY.

ACTION to recover possession of a tract of land, heard by *Ward, J.,* at January Term, 1908, of WASHINGTON.

A jury trial was waived and the facts were found by the court. From a judgment declaring that plaintiffs, in no view of the case, were entitled to recover, they appealed.

Ward & Grimes, W. M. Bond and *Huggins, Huggins & Johnson* for plaintiff.

Shepherd & Shepherd, Pruden & Pruden and *J. W. Bailey* for defendants.

BROWN, J. The plaintiffs claim title under a deed executed by the executors of P. N. Gray by virtue of a power contained in his will. In September, 1902, P. N. Gray died testate, domiciled in Ohio, seized in fee simple of the land in question in North Carolina, together with other real estate in Ohio. By his will A. H. Johnson and Philemon J. Dill, residents of Ohio, were named as his executors. The will was probated in Franklin County, Ohio, and the executors were regularly qualified in that State. In December, 1902, the will was duly admitted to probate in Washington and Tyrrell counties, North Carolina. The executors never qualified in North Carolina, and no administrator has been appointed therein. The will of P. N. Gray empowered the executors to sell at either public or private sale all the testator's real estate, not specifically devised to his wife, located in Ohio or North Carolina, for cash or on time payments, and to execute deeds to the purchasers. This land in North Carolina was not specifically devised to the testator's wife.

On 6 February, 1906, the executors sold under the power in the will the real estate in North Carolina to plaintiffs, and executed and delivered a deed therefor to plaintiffs. This deed was properly probated and registered in both Washington and Tyrrell counties, North Carolina, in which the land is located, prior to the beginning of this action.

The plaintiffs' title depends upon the validity of this deed. We agree with the learned Judge of the court below that the deed from the executors to plaintiffs conveyed no title, inasmuch as under the law of this State the executor must qualify here in order to exercise any control over the testator's estate. The general proposition is conceded that an executor stands upon a different footing from an administrator, as the former derives his authority from the will and not simply from the law, and when he proves the will, as required by the law of the domicile of the testator, it passes the property to him, wherever it may be situated, according to its legal effect. Therefore it has been frequently held, in the absence of statutory regulation to the contrary, that when the will has been admitted to probate according to the laws of the State in which is the *situs* of the property, the executor may maintain an action of ejectment for the land in such State without taking out letters testamentary therein. *Lewis v. McFarland,* 9 Cranch, 152; Am. and Eng. Enc. (2d Ed.), 918, and cases cited. These authorities would control here but for the express words of our statute (Revisal, sec. 28), which reads as follows: "Executors shall give bond as prescribed by law in the following cases: 1. Where the executor resides out of the State. And no foreign executor has any authority to intermeddle with the estate until he shall have entered into bond, which must be done within the space of one year after the death of the testator, and not afterwards."

The proposition contended for by the appellant is also conceded, that generally the personal representative has no control over and no concern with the landed estate. It goes directly to the heirs, unless directed in some other channel by the will. So it follows that a devisee may take possession of land devised to him, after the will is admitted to probate in the State where the land is situated, whether the executor qualifies or not.

But this land in controversy is devised to the executor, with power to sell, convey title and receive the purchase money. It is not given to the executors individually, but in their representative capacity.

This money may become necessary assets with which to liquidate the testator's debts in this State. Devisees or residuary legatees residing in this State may be interested in its ultimate distribution. Therefore, for reasons of State policy, our statute prohibits the foreign executor from exercising any control over the estate, both real and personal, until he qualifies under our own laws.

We are unable to give the words of the statute the narrow construction contended for, and to hold that the word "estate," as used therein, refers only to personal assets. Such interpretation of the law would tend largely to destroy its usefulness.

We must assume that the Legislature used the word "estate" in its true legal significance, and as such it embraces an interest in anything that is the subject of property, especially in lands. Preston defines it to be "the interest which any one has in lands or in any other subject of property." 1 Prest. Est., 20; 2 Blk. Com., 103; 2 Crabb Real Prop., p. 2, sec. 942. To the same effect are Coke and all other English authorities. Coke Litt., 345. In the American courts the word "estate" is a word of the greatest extension and broadest significance. It comprehends every species of property, real and personal. 2 Redfield on Wills, ch. 14, sec. 48. *Deering v. Tucker,* 55 Me., 287; *Godfrey v. Humphrey,* 18 Pick., 537.

The word "intermeddle" is of equally broad significance, and prohibits any interference with or control over any part of the estate until the terms of the act are complied with. This certainly would forbid a sale by a foreign executor of the landed estate situated here. Although the facts in *Scott v. Lumber Co.,* 144 N. C., 45, are a little different from

this case, we think the principle upon which that case was decided is the same in this. It is there said that a deed to real property, made by foreign executors by virtue of authority in the will, is void in this State, unless the executors qualify here. In support of that statement of the law the Chief Justice cites the very statute we have quoted, and grounds the judgment of the Court upon it.

We are of opinion that in the trial in the Superior Court the Judge committed

No Error.

J. S. BASNIGHT v. SOUTHERN JOBBING COMPANY ET AL.

(Filed 30 September, 1908.)

1. **Contracts—Fraud or Mistake, How Taken Advantage of—Collateral Attack in Action Upon.**

   Parol evidence is admissible to vary the terms of a written instrument, only for fraud or mistake, and then the contract must be reformed, upon proper allegations, in an independent action, or by way of affirmative defense, properly pleaded, in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself.

2. **Corporations—Contracts, Written—Principal and Surety—Sureties Signing as Officers—Parol Evidence.**

   A written contract, expressed in clear and unambiguous terms, which is set up in the complaint and admitted in the answer, and which was made by a corporation and its stockholders, the latter being named as sureties, with a purchaser of stock, stating that upon demand one year from date the corporation will pay a sum certain for the stock thus bought, should he (the purchaser) so elect, cannot be varied by parol evidence so as to show that some of the stockholders signed only as officers of the company and not as sureties, though their official signature appeared upon the instrument. (*Typewriter Co. v. Hardware Co.*, 143 N. C., 97, and other like cases, cited and distinguished.)

3. **Same—Form of Signature—Effect.**

   In the body of a contract made by a corporation, guaranteeing certain conditions to a purchaser of shares of its own certificates of stock, it was stated that the corporation had signed as

principal and its stockholders as sureties. Some of the stockholders, who were officers, signed the instrument, using their official designation: *Held*, (1) the form of the signature was unimportant and could not vary the clear intent expressed in the body of the instrument; (2) the intent of the sureties to bind themselves personally was not changed by the form of their signatures, for such a change would make the corporation its own surety, amounting in effect to no surety, as the debts of the corporation would have to be first paid.

ACTION heard before *W. R. Allen, J.*, and a jury, at February Term, 1908, of CRAVEN.

This is an action by the plaintiff against the Southern Jobbing Company, J. J. Baxter and W. J. O'Neal, to recover the sum of $5,000, which was paid by him for fifty shares of the stock of the jobbing company, under an agreement between him and the said parties, which is as follows:

"This agreement, made and entered into this 24 May, 1905, by and between the Southern Jobbing Company, a corporation in the State of North Carolina, party of the first part, and Jesse S. Basnight, party of the second part, and J. J. Baxter, W. G. O'Neal, E. F. O'Neal and David Kramer, stockholders of the Southern Jobbing Company, all of New Bern, N. C., parties of the third part, witnesseth:

"That the said parties of the first part and the third part do represent to the party of the second part that the exhibit marked 'A,' hereto attached, is a true and correct inventory and statement of all the liabilities of the party of the first part outstanding.

"That the total amount of capital stock issued by the said party of the first part is the sum of $5,000 par value, and that for and in lieu of the dividends earned up to this time the corporation will issue stock of the value of $1,200 and will apportion $300 of stock to David Kramer; and do further represent that there is now due the said corporation debts as shown in exhibit 'B,' a copy of which is hereto attached; and do further represent that the statement hereto

attached, marked 'Exhibit C,' is a true and correct statement of the financial affairs of said corporation.

"Upon which representation the said Jesse S. Basnight has agreed, and does hereby agree, and does hereby subscribe to fifty shares of the stock in the said Southern Jobbing Company, at par, to-wit, $5,000, upon the following terms and conditions: (1) The parties of the third part do agree to execute proxies, irrevocable for one year, to the said Jesse S. Basnight to vote their stock at any and all meetings of the company. (2) That the said Jesse S. Basnight shall be elected, for a term of one year, treasurer of the Southern Jobbing Company and general manager thereof, at the salary of $1,250 per year, to be paid in monthly or quarterly installments. (3) That the said Jesse S. Basnight shall have the option, at the expiration of one year from date, of selling the said stock, with all accrued dividends and profits, to the said Southern Jobbing Company at the price of $5,000, without interest or profit added, or he shall have the option to keep and hold the said stock, together with all profits and dividends declared or accumulated, as if the said purchase had been absolute and unconditional.

"And the said party of the first part, as principal, and the said parties of the third part, as sureties, do hereby contract and agree with the said party of the second part: (1) That upon his demand, one year from date, the party of the first part will pay to Jesse S. Basnight the sum of $5,000 for his said fifty shares of stock. (2) That they will warrant and guarantee that the said statements and exhibits 'A,' 'B' and 'C' are true and correct and do contain a full statement of what they purport to show. (3) That they will guarantee the payment and collection of all debts due the party of the first part, as shown by 'Exhibit B,' aforesaid, on or before twelve months from date, together with interest thereon from and after maturity. (4) That the salary and proxy above shall be paid and executed as there stated.

"And the said party of the second part does hereby contract and agree that he will enter upon his duties as treasurer and general manager as aforesaid, and will devote thereto such part of his time as shall be necessary and beneficial for the interest of the said corporation.

"In testimony whereof, the said parties have hereunto subscribed their names and affixed their seals this 24 May, 1905.

"SOUTHERN JOBBING COMPANY,
"Per J. J. BAXTER, *President.* [Seal.]
"J. J. BAXTER, *President.* [Seal.]
"W. G. O'NEAL, *Secretary.* [Seal.]
"D. KRAMER, *Vice-Pres.* [Seal.]
"E. F. O'NEAL. [Seal.]
"J. S. BASNIGHT." [Seal.]

The contract is set out in the complaint. In their answers J. J. Baxter and W. G. O'Neal admit that they executed the contract, but aver that it was not executed by them as sureties, as it was agreed at the time they signed it that they should not be liable individually as sureties, and they affixed their official titles to their names and intended to sign it merely as officers of the corporation. Without objection by the defendants, the court submitted issues to the jury, which, with the answers thereto, are as follows:

1. "Was it the agreement between the parties, at the time of signing the contract in this action, that the defendant Baxter would not be personally liable?" Answer: "Yes."

2. "Was it the agreement between the parties, at the time of signing the contract in this action, that the defendant O'Neal would not be personally liable?" Answer: "Yes."

The defendant J. J. Baxter testified: "The plaintiff came to me with a written paper and asked me to sign the same. I told him I would not be individually liable. I first signed the paper for the Southern Jobbing Company, and plaintiff

asked me to sign individually also. I told him I would not sign individually, but would sign my name as president of the company, and would agree for my stock to be liable to him for the repayment of his money. I signed the paper 'J. J. Baxter, President.' Plaintiff asked me not to add 'president.' I said: 'Do you take me for a fool?' He and I then agreed that I should not be personally liable, but my stock would only be liable to him in addition to all of the property of the concern, which was turned over to him as general manager." W. G. O'Neal testified to the same effect.

The plaintiff testified that there was no such agreement, but that the defendants Baxter and O'Neal were to be liable individually as sureties, according to the terms of the contract; that before the contract was executed he had several verbal conversations with the officers of the company and told them to put their proposition in writing, whereupon they delivered to him a paper, in the handwriting of Baxter, of which the following is a copy:

"We, the stockholders of the Southern Jobbing Company, guarantee to J. S. Basnight a profit of 25 per cent. for one year on an investment of $5,000 in our company. May 22, 1905.

"J. J. BAXTER,
President.
"W. G. O'NEAL,
Secretary and Vice-President."

In reply to that paper he handed them a paper, of which the following is a copy:

"May 22nd, 1905.

"*To Southern Jobbing Company.*

"GENTLEMEN:—In lieu of your proposition of to-day, I am writing. I make you the following proposition: (1) I will take $5,000 worth of stock at par in your company, reserving the option to return the stock to the company at the end of one year, without interest or dividends, the

company and present stockholders guaranteeing to refund the money at my option at that time. (2) The company to pay me a salary of $1,250 for the one year. (3) The present stockholders are to guarantee the collecting of all bills now outstanding, and also that the statements made include all liabilities of the company. (4) If I decide at the end of the year to keep my stock, it is to stand thereafter on an equal footing with all other stock. (5) You are to elect me general manager and treasurer for one year. (6) You are to give me proxies of others, so I may have a majority vote at stockholders' meeting for one year.

"Yours respectfully, J. S. BASNIGHT."

J. J. Baxter wrote an acceptance of his proposition on the paper, which is as follows:

"The above proposition accepted by the Southern Jobbing Company. J. J. BAXTER,
President."

He further testified: "I had refused to make a verbal agreement and thought it best, if we made any trade at all, that it should be reduced to writing. I then carried the papers containing the proposition, the counter-proposition and acceptance to my attorney, W. D. McIver, and requested him to draw up the contract accordingly. He had the contract drawn up, with several copies; one was given to me, one to J. J. Baxter at his store, and another to O'Neal at the office of the Southern Jobbing Company, and afterwards the contract was signed."

The testimony of J. J. Baxter and W. J. O'Neal was objected to by the plaintiff in apt time. The objection was overruled and the testimony admitted.

The plaintiff moved for judgment, notwithstanding the verdict. After consideration of the motion, the court set the verdict aside and entered judgment for the plaintiff, upon the ground that under the pleadings it was not competent

to introduce oral evidence to relieve the defendants J. J. Baxter and W. G. O'Neal from individual liability, and that as matter of law each was liable on the contract as surety. The defendants Baxter and O'Neal excepted and appealed.

W. D. McIver and *W. W. Clark* for plaintiff.
D. L. Ward and *Simmons, Ward & Allen* for defendants.

WALKER, J., after stating the case: The decision of this case must depend upon what appears in the pleadings. The plaintiff alleges the execution of the contract sued on, which is admitted by the defendants in their answer. The terms of that contract are plain and unambiguous. The defendants explicitly agree therein with the plaintiff that they will become sureties of the jobbing company for the strict performance of the obligation assumed by the company, which is that, upon demand, and one year from the date of the contract, the jobbing company will pay to the plaintiff the sum of $5,000 for his fifty shares of stock. There can be no doubt as to the correct meaning of this language. It is an express and unconditional promise, in their individual character, that the money shall be paid at the appointed time. In their answers the defendants deny this allegation and aver that they were not to be liable personally or individually. This is a square contradiction of the terms of the contract and of the obligation to pay the money themselves, which they assumed by the execution of the instrument. The issues were framed and submitted to the jury in exact accordance with the averments in the pleadings, and oral evidence which was offered by the defendants to support the affirmative of those issues was admitted by the court. The evidence was incompetent, and the ruling of the court in setting aside the verdict and giving judgment for the plaintiff was clearly right. There is no rule better settled in the law than that oral evidence is not admissible to vary or contradict a written instrument, unless there has been fraud or mistake, in which

case it must be reformed by an independent action or by way of affirmative defense in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself. *Etheridge v. Palin,* 72 N. C., 213; *Ray v. Blackwell,* 94 N. C., 10; *Terry v. Railroad,* 91 N. C., 236; *Moffitt v. Maness,* 102 N. C., 457; *Bank v. Moore,* 138 N. C., 529; *Mudge v. Varner,* 146 N. C., 147. In *Meekins v. Newberry,* 101 N. C., 18, it is said to be "a settled rule that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake, properly alleged, parol evidence cannot be heard to alter, contradict or modify it." Evidence, under this rule of exclusion, is never admitted, if the wording is clear or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract. Browne on Parol Evidence, p. 199, secs. 55-56; *Gilbert v. Moline Plow Co.,* 119 U. S., 491; The Delaware, 14 Wall., 579; *Kean v. Davis,* 21 N. J. L., 683. If the terms of the contract clearly and sufficiently determine the intent and meaning of the parties, the form of the signature is not important and will not bring the case within any exception to the rule. *Fowle v. Kerchner,* 87 N. C., 49; *Hicks v. Kenan,* 139 N. C., 337.

There are decisions of this and other courts to the effect that it may be shown by parol evidence that an obligation was not to be assumed except upon a certain contingency, or that the liability should be discharged in a certain way, these being stipulations intended to be a part of the contract, but not reduced to writing by the parties. *Braswell v. Pope,* 82 N. C., 57; *Penniman v. Alexander,* 111 N. C., 427 (affirmed in 115 N. C., 555); *Kerchner v. McRae,* 80 N. C., 219; *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97. Other cases are cited in *Braswell v. Pope, supra,* and *Evans v. Freeman, supra.*

If the stock only was to be "liable" for the debt, we do not see why the defendants affixed their official titles to the

signatures. This does not indicate, in the least, that they were limiting their liability to the stock held by them. If it was intended that the stock should be applied to the payment of the debt, and that there should be no personal liability, the company would be its own surety, and, besides, the plaintiff would have no security at all for his debt against the company, as the debt would in law have to be paid before any of the assets of the corporation could be used to redeem its stock. If the stock was a security in name, it would be valueless as a security in fact. If the parties signed, as they did, for the purpose of representing the corporation, the same result would follow, but they do not profess to have executed the contract for the company.

We find no error in the ruling of the court.

No Error.

JOSEPH E. JONES v. ALLIE JONES, ADMINISTRATRIX, ET AL.

(Filed 30 September, 1908.)

1. Contracts—Lands—Specific Performance—Equity Will Enforce, When.

   While specific performance of a contract to convey lands is enforcible only in the sound equitable discretion of the court, and not as a matter of right, in the absence of fraud, mistake or other element making such performance inequitable or a hardship, the courts will grant the relief demanded.

2. Same—Administrator—Mortgagor and Mortgagee—Vendor and Vendee.

   Plaintiffs, in an action to enforce specific performance of a contract to convey lands, made by deceased and his wife, brought suit against the wife as executrix of her husband, and obtained judgment that the administratrix execute and deliver a deed to him upon payment of the purchase money on a specified day, and in default the lands be sold at public auction for cash, etc., naming a commissioner; also, that the case be retained for further consideration of questions raised by the pleadings in regard to the disposition of the purchase money. The case was inadvertently dropped from the docket by the Clerk, and at a

subsequent term reinstated, on defendant's motion, the Judge finding that the administratrix failed to advertise the land as directed, but had since then made a deed to plaintiff upon payment by him of purchase money: *Held*, (1) the judgment, in effect, was to declare the holders of the legal title trustees to secure the purchase money and pay remainder to plaintiff, and by the administratrix accepting the money, the same result would follow upon equitable principles, and her deed would be valid; (2) the decree of sale of the land as made by the court was a proper one, as the relation of vendor and vendee under such conditions is, for all practical purposes, that of mortgagor and mortgagee.

Plaintiff, at the Spring Term, 1905, of the Superior Court of Greene County, instituted an action against the defendant Allie Jones, administratrix, and the other defendants, heirs at law of Gardner Jones, deceased, for the purpose of compelling specific performance of a contract entered into by said deceased to convey to plaintiff a tract of land in consideration of the payment of the sum of $1,000. Appropriate pleadings were filed, and at May Term, 1906, the jury, in response to issues submitted to them, found that Gardner Jones and his wife, the defendant Allie Jones, executed and delivered to plaintiff the contract as alleged, and that plaintiff had been and was then ready, able and willing to pay the purchase money. The court thereupon rendered judgment directing the administratrix, upon the payment of the purchase money, to execute and deliver to plaintiff a deed for said land. It was further adjudged that the payment be made on or before 1 October, 1906, and that in default thereof the said land be sold at public auction for cash, at the courthouse door, etc., naming a commissioner to make the sale. It was further adjudged that any and all questions raised by the pleadings in regard to the disposition of the purchase money be retained for further consideration. The case was retained for further orders. The clerk inadvertently dropped the case from the docket. At May Term, 1907, after due notice, a motion was made to reinstate the case. At December Term, 1907, the court found that Joseph E. Jones, the plain-

tiff, failed to comply with the judgment rendered at May Term, 1906, and that the administratrix failed to advertise the land for sale, as directed, but on 1 January, 1907, executed to the plaintiff a deed for the said land, upon the payment of the purchase money and interest. It was therefore adjudged that the deed be set aside and that the commissioner be directed to sell the land in pursuance of the decree of May Term, 1906, and make his report to the next term of the court; that the case be retained, etc. To this judgment plaintiff duly excepted and appealed.

Skinner & Whedbee for plaintiff.
Y. T. Ormond for defendants.

CONNOR, J. The learned counsel for defendants contends that when the plaintiff failed to pay the purchase money on 1 October, 1906, his right to call for a deed, and the power of the administratrix to execute one, was at an end. It is true, as insisted by defendants' counsel, that specific performance is not a matter of strict right, but is to be enforced in the sound, equitable discretion of the court; but it is also true that, in the absence of fraud, mistake or other element making such performance inequitable or a hardship, the courts always grant the relief demanded. The question as to plaintiff's right to call for the deed, upon the payment of the money, was fixed by the judgment of May Term, 1906. There was no provision in the decree declaring a strict foreclosure of plaintiff's equity upon his failure to pay on the day fixed; on the contrary, a sale was ordered. If a sale had been made, a final decree would have directed the payment out of the proceeds of the $1,000, and interest, to defendants, and the balance would have been paid to plaintiff. The effect of the judgment was to declare the heirs at law of Gardner Jones the holders of the legal title, as trustees, to secure the purchase money and pay the remainder to plaintiff, just as if Gardner Jones had held at his death a mortgage on the

land to secure the debt. This being true, we are not able to see why, upon equitable principles, the same result could not be worked out by the administratrix accepting the money at any time before the sale and making the deed. The delay of three months, with the consent of the administratrix, worked no injury to defendants. It did not even delay them in getting possession of the money, as the commissioner was required, if he sold, to report his sale to the next term of the court. If the court had rendered a decree of strict foreclosure, very unusual at this day, and plaintiff had failed to pay on the day named, a different case would have been presented. The learned counsel suggested that a distinction was to be found between a case where the vendor sued for the purchase money and this, in which the vendee was suing for specific performance, the latter being an invocation of the equitable aid of the court. It may be that formerly, when the courts were more rigid in limiting the right to equitable relief, such a distinction for some purposes may have been made. This Court has for many years treated the relation of vendor and vendee, for all practical purposes, as that of mortgagor and mortgagee, with all of its incidents. The decree rendered by the court at May Term, 1906, was in strict accord with the practice in this State in such cases. If the land had been sold under that decree, the plaintiff would have had the surplus, after paying the purchase money. If that is paid before the sale, the defendants will have what is due them, and the plaintiff the land. The only question left open is the adjustment of certain rights asserted, as between defendants, to the fund. The judgment appealed from must be reversed and the cause proceeded with, as directed by the judgment of May Term, 1906. The plaintiff will recover his cost in this Court.

Error.

J. W. PERRY COMPANY v. TAYLOR BROS. ET AL.

(Filed 30 September, 1908.)

Negotiable Instruments—Endorser—Dishonor—Notice—Discharge.

A person, not otherwise a party, placing his name in blank on the back of a negotiable note before delivery, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, is liable as an endorser, and discharged therefrom upon failure of notice of nonpayment and dishonor at maturity. (Revisal, secs. 2212, 2213, 2219, 2239; *Rouse v. Wooten*, 140 N. C., 558, cited and distinguished.)

ACTION tried before *W. R. Allen, J.*, and a jury, at May Term, 1908, of GREENE.

Plaintiff appealed.

L. V. Morrill and *C. B. Aycock* for plaintiff.

Jarvis & Blow for defendants.

WALKER, J. This action was brought to recover the amount of a promissory note, made on 23 May, 1906, by B. D. Taylor and others to the plaintiff, for the sum of $2,500, with interest from its date. The defendants J. T. Bowles and A. F. Moye (appellees) endorsed the note in blank before it was delivered to the plaintiff. The note was not paid at maturity, but was dishonored. The plaintiff failed to give notice to the endorsers of nonpayment and dishonor, and they were not notified of the same until this action was commenced. The court intimated, upon the evidence, that, as plaintiff had failed to give notice of nonpayment and dishonor, the jury would be instructed to answer the issues in favor of the defendants, who were the endorsers. The plaintiff excepted, submitted to a nonsuit in deference to the intimation of the court, and appealed.

Whatever may have been the law heretofore, it is now provided, and was so provided at the time the note upon which this suit was brought was given, as follows:

"A negotiable promissory note, within the meaning of this chapter, is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Revisal, sec. 2334.

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Revisal, sec. 2212.

"Where a person not otherwise a party to the instrument places thereon his signature in blank before delivery, he is liable as endorser" (under rules specified in the section). Revisal, sec. 2213.

"Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and endorsers." Revisal, sec. 2219.

"Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or endorser to whom such notice is not given is discharged." Revisal, sec. 2239.

It appears, therefore, that as the defendants placed their signatures on the back of the note, and they were not otherwise parties to the instrument, they became liable as indorsers and were entitled to notice of dishonor after its maturity. Eaton & Gilbert on Commercial Paper, sec. 108.

The case of *Rouse v. Wooten,* 140 N. C., 558, which was cited by the plaintiff's counsel, does not bear on this case. as

there the defendant was a surety, and so found to be by the jury. The only question raised in that case was whether a surety is entitled to notice of nonpayment and dishonor. We held that he is not.

The ruling of the Judge was correct.

No Error.

L. M. BRAME v. S. W. CLARK.

(Filed 30 September, 1908.)

1. **Trespass—Presumptions—Damages—Pleadings—Allegations Sufficient.**

From every action of trespass the law infers some damages, and an allegation that defendant did unlawfully, forcibly, etc., enter upon certain lands in plaintiff's possession and occupation is sufficient to sustain the action.

2. **Trespass—Pleadings—Husband and Wife—Attempted Seduction—Damages, Aggravation of.**

Under an allegation of trespass, in a suit by the husband, coupled with averments that it was with the "unlawful, malicious, lascivious," etc., intent and purpose to seduce, debauch and carnally know the plaintiff's wife, and that defendant did then attempt to seduce and carnally know her, the jury may award exemplary damages to the husband, under pertinent evidence, in aggravation of the actual damages caused by the mere act of trespass.

3. **Trespass—Husband and Wife—Seduction Attempted—Damages, Right of Husband to Recover—Constitutional Law.**

The statutory and constitutional enlargement of the property rights of the wife does not affect the rights of the husband, in an action of trespass upon his home, upon the wife's land, with the intent and attempt to seduce or carnally know her.

ACTION heard on demurrer to complaint by *Lyon, J.*, February Term, 1908, of VANCE.

The plaintiff filed his complaint in the following words, to-wit: "(1) That on or about 25 April, 1907, the defendant, near the village of Dabney, at and in the county of Vance and State of North Carolina, and near the public road lead-

ing from Dabney to Dexter, did unlawfully and forcibly, wickedly and maliciously enter upon a certain lot or parcel of land, then in the possession and occupancy as a residence of plaintiff, with the unlawful, malicious, lascivious and wicked intent and purpose to seduce, debauch and carnally know one Lovetta Brame, the wife of plaintiff, and did then and there wickedly, maliciously, unlawfully, wrongfully and willfully insult and attempt to seduce and carnally know the said Lovetta Brame, plaintiff's said wife, to plaintiff's great damage, $2,000."

Defendant demurred, for that "(1) No special damage or injury or actionable wrong to plaintiff is alleged, the wife not being a party and the complaint not showing that plaintiff has suffered any special damages or any damage. (2) The complaint does not set forth any facts sufficiently definite and specific to constitute a cause of action, in not setting out the acts and things complained of in such manner as that it may be seen that, if true, they constitute an actionable wrong. (3) An attempt to seduce is not actionable, no seduction or injury being alleged."

His Honor overruled the demurrer and allowed defendant sixty days to answer. Defendant excepted and appealed.

A. C. Zollicoffer and *Thomas M. Pittman* for plaintiff.

T. T. Hicks for defendant.

CONNOR, J. There can be no doubt that the plaintiff has alleged an actionable wrong—a trespass upon his possession of real estate. It is elementary that "Every unauthorized and therefore unlawful entry into the close of another is a trespass. From every such entry against the will of the possessor the law infers some damage; if nothing more, the treading down the grass or the herbage." *Ruffin, C. J.*, in *Dougherty v. Stepp*, 18 N. C., 371. His Honor's judgment was clearly correct.

Both parties, however, discussed, although from different points of view, the question of damage, which, upon the admissions made by the demurrer, plaintiff was entitled to recover. The defendant argued the case upon the theory that two causes of action are stated—one for trespass on realty, the other for injury, etc., inflicted upon the wife. His learned counsel strongly contends that the conduct of the defendant was not an actionable wrong to the plaintiff. However this may be, and without intimating any opinion upon it, we do not so construe the complaint. The plaintiff alleges a malicious, unlawful and forcible trespass, setting out that it was made with the malicious intent to, and that he did in truth then and there willfully, wickedly, maliciously, etc., insult and attempt to seduce and carnally know plaintiff's wife. This matter is stated as the foundation for a claim of actual and vindictive damages, the cause of action being the trespass. We are asked to pass upon the question whether in the assessment of damages these matters may be considered by the jury in aggravation. In *Duncan v. Stalcup*, 18 N. C., 440, *Daniel, J.*, says: "In looking into the books we find the rule in this action to be that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant and the degree of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass." In this case vindictive damages were awarded. In *Day v. Woodworth*, 54 U. S., 363, *Grier, J.*, said: "In actions of trespass, when the injury has been wanton and malicious or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further, by way of punishment or example, which has sometimes been called 'smart money.'" This was an action *quare clausum fregit*.

In *Mitchell v. Billingsley,* 17 Ala., 396, it was shown that defendants, in the commission of the trespass, used indecorous and insulting language, and that one of the defendants had a pistol. Exemplary and punitive damages were awarded. In *Merest v. Harvey,* 5 Yount, 442, *Heath, J.,* says: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off, and the court refused a new trial. * * * It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages." *Gibbs, C. J.,* said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except large damages. * * * I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain." In this case, for a trespass, £500 was given. In discussing the question whether for injuries sustained by a plaintiff in respect to his marital rights his action was for trespass or case, Mr. Street says: "Clearly, we are here confronted with a class of wrongs which, historically, have their roots in the law of trespass, but which, nevertheless, in maturity, lie altogether beyond the field of trespass and belong to that body of legal injuries in which harm is conceived as being done, not to persons or property, but to rights incident to him." Foundations Legal Liability, 264. It is suggested that, while it is true that exemplary damages may be recovered for malicious trespass upon property and for insulting language to the owner, the wife alone can sue for damages sustained by her on account of indecent and insulting language and conduct. For the purpose of supporting this view, the recent changes made by the Constitution and statutes in respect to the property and personal rights of married women are relied upon. We cannot think that, because the property rights of the wife have been enlarged and her right to sue alone for injuries to her person and property conferred, the right and duty of the husband to be the head

of the family, to protect the honor and virtue of his wife, to recover for injuries sustained by interference with his maritial rights, have been destroyed.

It is true that, as held by this Court, while he may be reduced to a mere steward or overseer of his wife's property, he is no less her husband, with all of the rights and duties incident to that relation. That which degrades or destroys her honor must affect his. It cannot be that, if by permission of the wife he is living on her land as his home, the law will not afford him protection against and damage for a malicious wrong done to him through his wife. The law would but mock him, if, when his home is invaded, his wife insulted and her virtue assaulted, it gave him for such injuries but a penny, permitting the offender to go "Scot free." If in the bitterness of his wounded spirit he sought redress by violation of the criminal law, subjecting himself to infamous punishment, the sympathy of his fellow men would be but little comfort to him. No man can long retain the respect of his wife and children if he does not seek redress for a malicious trespass upon his home and for an attempt to seduce his wife. The ancient law declared, "A patriarch is lord in his own house and family, and no person has a right to interfere with him—not even the village elder or the imperial judge." Again, it is said: "The house father was responsible for the due performance of his *sacra* and for the purity of his ritual." States grow in virtue and strength; citizens are loyal and home-loving in proportion as the unity of the family is preserved; the husband and father is recognized as the head of the family, the wife living under his protection and looking to him to guard her person and honor from all harm. The husband must have redress for wrongs done him by seeking the award of such actual and exemplary damages as a jury may find to be proper, rather than by violating the criminal law.

The judgment of his Honor was correct and must be Affirmed.

CARRIE SESSOMS v. ANNE E. TAYLOE ET AL.

(Filed 30 September, 1908.)

Husband and Wife—Lands—Permissive Occupation—Rent—Year's Support—Liens for Advances—Evidence—Instructions.

When, without contract or agreement as to rent, deceased and his wife were occupants of land by permission of the owners, lived with them and were cultivating a crop thereon at the time of his death, having executed to the owners a crop lien not to exceed $121, and at his death his widow was allowed for her year's support the sum of $50 from the proceeds of the crop raised, and her whole allowance did not equal the full amount specified by statute, and the deceased's portion of the value of the crop is more than sufficient to pay the $121 limited in the crop lien and the $50 allowed the widow: *Held*, (1) that the widow could maintain an action for her allowance against the owners of the land in possession of the crops; (2) that the lower court should have instructed the jury, according to plaintiff's prayer, there being no evidence of any advances made under the lien bond introduced by defendants, that nothing could be recovered thereunder; (3) that, in the absence of evidence as to the value of the rent, the jury should award nothing on that account.

ACTION before *O. H. Allen, J.*, and a jury, at April Term, 1908, of BERTIE.

Eliminating all immaterial matter, the record discloses the following facts: Defendants, on 21 February, 1906, were the owners of a small tract of land, which they conveyed to J. P. Sessoms, the husband of plaintiff, reserving a life estate. They permitted said Sessoms to move upon the land in January, 1907, for the purpose of cultivating and making a crop thereon. The defendants were elderly maiden ladies and lived on the land. Sessoms was their nephew. It seems that he, with his wife and child, lived in the house with defendants. There was no contract between the parties in regard to rent. On 12 January, 1907, Sessoms executed a crop lien or chattel mortgage to defendants upon all of the crops to be raised by him on the land during the year 1907, for the purpose of securing money and supplies to be advanced

to him by them, and, to the extent of $121, to be expended in the cultivation of the crop. At sometime during the year, about July, Sessoms was taken sick, and died in September, leaving the plaintiff, his widow, and one child. Plaintiff at times worked on the crop and hired hands to do so, paying them. The testimony in regard to the time and amount paid is indefinite. Soon after the death of her husband plaintiff applied for her year's support, and it was duly allotted to her, consisting of household and kitchen furniture, etc., and "the crop on the land of J. W. Sessoms and Anne E. and Melissa Tayloe, subject to the expense of housing and indebtedness, $50." The entire property allotted was of less value than the amount to which she was entitled as her year's support. It seems from the record that a portion of the personal property, together with the entire crop made on the land, was in the possession of defendants. After the allotment, W. L. Vaughn, as agent of the plaintiff, tendered to defendants the amount of the indebtedness due them, and demanded possession, which was refused. Defendants claimed that all of the crop belonged to them. On 7 October, 1907, plaintiff brought suit to recover the personal property and crop, and at the same time obtained possession by virtue of the order of the Clerk. Her agent housed the crop. There is no evidence of the amount advanced to Sessoms pursuant to the lien, or of the time during which defendants worked on the crop, or the amount paid out by them for labor. One witness says that he stripped fodder one day. In the complaint plaintiff alleges that she is the owner and entitled to the possession of the crops and that defendants wrongfully detain them. The answer denies these allegations. The other property was eliminated from the action by an offer on the part of defendants to submit to judgment for the recovery thereof and "to judgment for the cost." The general issues were submitted. His Honor charged the jury that the law presumed that the defendants in pos-

session of the land were the owners of the crop, they not having parted with the life estate. Plaintiff excepted. Several requests for instructions were made by plaintiff, which will be noted in the opinion, all of which were refused and exceptions duly taken. The jury answered the issues against plaintiff and assessed the value of the crop, "after expense of housing," at $300. There was judgment against plaintiff and her security for the value of the crop and costs. Plaintiff excepted and appealed.

Winston & Matthews for plaintiff.
W. R. Johnson for defendants.

CONNOR, J., after stating the case: It is settled by numerous decisions of this Court that, under our system of procedure, when the action is for the possession of personal property, or the value thereof, in the nature of the old action of *detinue,* the Court will in proper cases treat the action as for foreclosure of liens, and adjust the rights of the parties, either upon the evidence or, if necessary, by a reference to state an account. In *Cotton v. Willoughby,* 83 N. C., 75, *Smith, C. J.,* said: "If the plaintiffs recover, they will hold as trustees, and, as all interested in the fund are before the Court, we see no reason why in the present proceedings the mortgage may not be foreclosed, the equities involved adjusted and the whole matter finally adjudicated in the action." In *Parker v. Brown,* 136 N. C., 280, an action in several respects like this, we said: "If she had a legal right, of which the defendant has deprived her, the Court will find and administer a remedy corresponding to her right." What, therefore, was the plaintiff's right in respect to the crop? To answer this question it is necessary to ascertain what right her husband or his personal representative had, and this involves the inquiry, What relation existed between the defendants and Sessoms in regard to his occupation of the land during the year 1907? The defendants having

reserved a life estate in the land, we do not perceive how the deed of 2 February, 1906, affects the legal status of the parties. The defendants were unquestionably the owners and in possession of the land. Sessoms entered and occupied it by their permission. He had no right, under the deed, to enter or cultivate the land. The testimony shows him to be an occupant, rather than a tenant. No rent was reserved. The crop, when made, was his property. Defendants' witness, Joseph Sessoms, the father of J. P. Sessoms, says: "I saw J. P. Sessoms work the crop. He was in charge of the place. * * * He was in charge of the land and they all lived there. I went there (to help work) on his account partly, and partly on account of all of them. He was my son and I did not want to see the crop ruin." The defendants took from Sessoms a lien "on all the crops which may be made by me upon said land during said year," describing it as the land of the defendants. The lien contains the provision: "And if I fail to pay the amount so advanced by the time specified, the said Anne Eliza and Melissa Tayloe shall have power to take possession of said crops and sell the same, the proceeds to be applied to the payment of said advances, and the surplus, if any, to J. P. Sessoms." This lien was introduced by defendants, but no evidence was offered showing that any amount was advanced by them. We do not find any evidence of a rent reserved by defendants, or indication of a lease of the land. It would seem that Sessoms was an occupant of the land for the purpose of cultivating it. He was liable to an action of *assumpsit*, for a reasonable amount, for use and occupation. "In such cases the law will imply a promise to pay compensation for the use and occupation." 2 Taylor Landlord and Tenant, sec. 636. By section 1986 of Revisal it is provided that, "Whenever any person shall occupy land of another by the permission of such other, without any express agreement for rent, * * * the landlord may recover a reasonable compensation for such

occupation." Whether the amount to be recovered "for use and occupation" is subject to the provisions of section 1993, Revisal, that "when lands shall be rented or leased by agreement, written or oral, for agricultural purposes," etc., the crop shall be deemed to be vested in the lessor, etc., is not clear. The statute (Revisal, sec. 1980) was enacted in 1850, because the Court, following the English decisions, had held that *assumpsit* for use and occupation would not lie unless there was an express promise to pay therefor. *Anonymous,* 2 N. C., 485 (559); *Long v. Bonner,* 33 N. C., 27. There is much evidence in this record indicating that defendants did not intend to charge Sessoms for "use and occupation," but that, for failing to support and take care of them, the deed should be "null and void." If the right to sue for "reasonable compensation" does not give any lien under section 1993, the right of the defendants is confined to an action against the administrator of Sessoms. As the interest of the plaintiff, under the allotment of her year's support, is confined to $50, she is not further interested in the right to the crop, as between the personal representative and the defendants, than the recovery of so much as will pay her the sum of $50. Assuming that, as between the parties to this action, the defendants are entitled to retain so much of the crop, under section 1993, as will pay the amount found to be due for use and occupation, it is manifest that the remainder belonged to the personal representative of Sessoms, subject to defendants' claim under the lien for amounts advanced to him and the widow's year's support. There was no evidence that any sum had been advanced. The plaintiff asked his Honor to instruct the jury that, as the defendants had offered no evidence of any such advances, they could not hold any part of the crop under the lien. We think that this instruction should have been given. The plaintiff further requested his Honor to instruct the jury that, even if the relation of landlord and tenant existed, in the absence of any

evidence of the value or amount of the rent, the defendants cannot hold any part of the crop for rent. Taking the view most favorable for the defendants, the plaintiff was entitled to this instruction. Other instructions were asked and refused, which are not necessary to be considered. Upon the whole evidence the plaintiff was entitled to maintain her action, certainly to the extent of recovering so much of the crop as was necessary to pay her $50 included in the allotment. We can see no good reason for ordering a new trial, with the delay and expense incident thereto. The small amount allowed by the law to the widow and her young children to provide for their support during the first year following the loss of the "breadwinner" should not be withheld from them by vexatious and expensive litigation. It is apparent from the entire evidence that the value of the crop, made largely by the labor of the sick husband, is sufficient to pay the widow her $50 and discharge the lien, which cannot exceed $121 and reasonable compensation for use and occupation. The defendants have wrongfully withheld it from her. Let the judgment be so modified that the plaintiff will retain from the proceeds of the crop seized in this action $50. She will out of the amount remaining pay the costs incurred in the Superior Court and the costs of this Court. The defendants will have judgment for the balance.

Modified and Affirmed.

H. C. BRIDGERS v. W. W. ORMOND ET AL.

(Filed 30 September, 1908.)

1. **Deeds and Conveyances—Deed in Escrow—Action for Possession—Procedure.**

An action for the possession of a deed to lands held in escrow, alleging the fulfillment of the conditions thereof, involves the title to lands, not merely the delivery of the deed, and the ancillary or provisional remedy of claim and delivery will not lie.

2. **Same—Judgment—Title—Jurisdiction—Removal of Causes.**

The effect of a verdict and judgment in an action for the delivery of a deed held in escrow, determining that the conditions thereof have been complied with, will be to transfer, not simply the deed, but the actual title to the land. If the deed should be destroyed, the judgment could be made to operate as a deed, or the court could decree the execution of another. Hence it was not error in the court below to order that the cause be removed to the county wherein the land is situated. (*Pasterfield v. Sawyer*, 132 N. C., 258; *s. c.*, 133 N. C., 44, cited and distinguished.)

ACTION heard before *Cooke, J.*, at June Term, 1908, of EDGECOMBE, to recover possession of a deed, alleged to be in the possession of the defendants.

Before answering, the defendants applied for removal to the county of Greene. From the order removing the cause the plaintiff appealed.

John L. Bridgers for plaintiff.
Jarvis & Blow for defendants.

BROWN, J. It does not appear that the ancillary or provisional remedy of claim and delivery has been resorted to in this action, and in order to maintain an action for the recovery of personal property it is not essential that it should be. The action may proceed to trial and the title to personal property be determined without resorting to the provisional remedy.

The complaint discloses that the purpose of the action is to recover possession of a deed that has never been in possession of the plaintiff. The deed was deposited in escrow, to be delivered upon the performance of a contract entered into by plaintiff and defendant Beaman in respect to the building of a railroad to Hookerton and the construction of a depot.

The land described in the deed is situated in the county of Greene. The plaintiff's right to call for the delivery of the deed depends upon the determination of the fact, in his favor, that he has complied with certain conditions which entitle him to demand and receive the deed. If the allegations of the complaint are denied (which they must be taken to be, for the purposes of this motion), then the right of the plaintiff to recover the land, not the deed solely, depends upon his ability to establish the facts he has alleged.

Thus it is plain to us that the actual title to the land will depend upon the findings of the jury, under the instructions of the court, to the issues submitted upon the pleadings. The effect of a verdict and judgment for the plaintiff would be to transfer, not simply the deed, but the actual title of the land to him. If the deed should be destroyed in the meantime, the judgment of the court could be made to operate as a deed, or the court could decree the execution of another.

Our statute is plain, and provides that actions for the recovery of real property or for the determination of any interest therein or for injuries thereto must be tried in the county where the property is situated.

While the plaintiff has now no such seizin as would enable him to maintain an action against a stranger for trespass upon land, he alleges an equitable title thereto, and when he establishes the allegations of his complaint, and a final decree is entered upon the findings, he will become seized, in fact and law, of the property.

There is no doubt that the old action of replevin or our modern provisional remedy of claim and delivery, which is a substitute for replevin and detinue, is appropriate for the recovery of deeds or certificates of stock and the like, when the object of the action is to regain possession of the specific papers and not to test the right or title to the property which they represent. When there is a dispute about the delivery of a deed conveying land, or when the right to demand its delivery is the question to be determined, such proceeding will not lie. Cobbey on Rep., sec. 2; 7 Lawson Rights and Rem., sec. 3643; *Flannigan v. Coggin,* 71 Wis., 28; *Hooker v. Latham,* 118 N. C., 186; *Pasterfield v. Sawyer,* 132 N. C., 258; *s. c.,* 133 N. C., 44. The decision in the last case is put upon the express ground that there is no evidence tending to prove an escrow. That the deed which plaintiff claims is in escrow appears from his complaint.

The facts set out in the complaint are sufficient to maintain the action to compel the delivery of the deed, but the issues, when raised, must be tried in the county of Greene, unless a removal for cause is ordered hereafter from that county to some adjoining county.

The order of removal is

Affirmed.

W. H. HADDOCK v. N. J. LEARY ET AL.

(Filed 30 September, 1908.)

1. **Deeds and Conveyances—Color—Boundaries—Presumption of Possession.**

A claimant to disputed lands, having failed to connect his chain of title, is presumed to have possession coextensive with the boundaries of the deed under which he claims, when there is no claim of adverse possession by another of any part of the land so described.

2. **Same—Agreed Dividing Line.**

The claimant to lands under color of title will not be presumed to be in possession thereof coextensive with the boundaries of the deed under which he claims, when it is made to appear that, by agreement of the one under whom he claims and within the statutory time, a division line was run, excluding therefrom the land in dispute.

3. **Same—Evidence in Rebuttal—Questions for Jury.**

When adverse possession has ripened the title to that part of the land in dispute, and within the boundaries of the deed under which it is claimed, a dividing line afterwards agreed to by parol cannot divest it. But when the title is not so established, and not established by a connecting chain thereof by deed, evidence that such line has been established by agreement with the one under whom the claim is made within the statutory time, is competent to go to the jury to rebut the presumption that claim of possession was coextensive with the boundaries of the deed, and the effect is the same, whether the line was mistakenly or knowingly located.

ACTION tried before *W. R. Allen, J.*, and a jury, at Spring Term, 1908, of JONES, to recover damages for trespass in entering upon and cutting timber on lands described in the complaint. There was a verdict for defendants, and plaintiff appealed.

D. L. Ward and *P. M. Pearsall* for plaintiff.

Simmons, Ward & Allen and *Warren & Warren* for defendants.

BROWN, J. The plaintiff introduced a grant to Thomas Pollock, and subsequent mesne conveyance, but was unable to

connect the Duncan Cameron deed made in 1843, in the chain of title, with the grant. The Pollock grant and such deeds as plaintiff offered cover the *locus in quo*. The plaintiff, not having a connected chain of title from the State, undertook to make out his title by adverse possession. The deed from W. G. Brinson, administrator of Hiram Brinson, to plaintiff, dated 4 June, 1891, constitutes the color of title under which plaintiff entered, and contains the same description, without courses and distances, as is found in the complaint.

The plaintiff testified that he was in possession of the land in dispute, and had been for twenty years, and that his deed covers it, but it is admitted that the plaintiff does not live on the *locus in quo* and that there is no clearing on it. The cutting of the timber by the defendants was done on their side of a line alleged by defendants to have been established by mutual consent between plaintiff and their immediate ancestor. The plaintiff denied that there was any such agreed line or that he had ever consented to it, and testified that he always claimed up to the boundaries of his deed. The defendants were permitted to prove, over the objection of the plaintiff, that the agreed line was surveyed by one Brown and that the plaintiff and Kit Bryan, defendants' ancestor, were present and agreed upon said line as the boundary of their respective lands and possessions.

The plaintiff objected to this evidence "as incompetent and irrelevant, and for the further reason that the line alleged to have been agreed upon was not run contemporaneously with the making of the deed."

The court, among other things, charged the jury as follows: "If the deed of the plaintiff covers the land in dispute, and he was in possession of the part of the land outside of the dispute, claiming to the boundaries of his deeds, his possession would extend to all the land in his deed not actually occupied by some one else. (His possession of a part would not, however, extend to any land occupied by another.)"

The plaintiff excepted to the part in parentheses. The court further charged the jury: "If you find by the greater weight of the evidence that the plaintiff and the grantor of defendants ran an agreed line on the map from K to H to G to F, in 1895, and the plaintiff after that time did not claim beyond this line, you should answer the first issue 'No,' although you should further find that the plaintiff's deed covered the land in dispute and he was living upon a part of the land embraced in his deed." To this part of the charge plaintiff excepted.

There is no question that, generally where a person enters into land under a claim of title thereto by deed, his entry and possession are referred to such title, and he is deemed to have a seizin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described in any other person. If the plaintiff had shown a connected title to this land from the grant down, or if his color of title had ripened by possession into an indefeasible title prior to the marking of the agreed line in 1895, the testimony would have been incompetent, for, the plaintiff having acquired the actual title in a recognized legal manner prior to the establishment of the line, such title could not be divested by a parol agreement, in regard to the running of a division line, subsequently entered into. For nothing is better settled in this State than that if the calls of a deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol agreement, unless the agreement was contemporaneous with the making of the deed. And this is all that the authorities cited by the learned counsel for plaintiff establish, as we read them. *Carroway v. Chancey,* 51 N. C., 361; *Shaffer v. Hahn,* 111 N. C., 1; *Buckner v. Anderson,* 111 N. C., 577; *Roberts v. Preston,* 100 N. C., 243; *Shaffer v. Gaynor,* 117 N. C., 23, 25.

In this case plaintiff had failed to show a chain of title by deed, and was endeavoring to make out a prescriptive title by color and possession. His deed, which was colorable title, was dated 4 June, 1891. The agreed line alleged by defendants to have been run, and fixing by consent the limits of their respective possessions, was made in 1895. Consequently, at that time the plaintiff had acquired no title to any of the land, for he had not then had seven years' possession of any part of it. It was therefore competent to introduce the evidence objected to, in order to show that, after the marking of that line in 1895, the plaintiff did not claim any right or possession beyond it. The evidence was competent, not upon a question of title, but upon one of possession, for the purpose of restricting plaintiff's constructive possession. It was not offered for the purpose of changing the boundaries of a deed, but to show that plaintiff made no claim up to the boundaries of his deed after 1895, only up to this agreed line, and that by his own voluntary act he had restricted his constructive possession to the limits of the agreed line. When the grantee of a deed is seated upon a part only of the land covered by its boundaries, he must claim its boundaries in order to ripen by possession his title to the whole. He must *claim* the right and title to the whole land, in order that his constructive possession may extend to the whole. *Chief Justice Parsons* has well expressed the general principle: "When a man enters on land, *claiming* the right and title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel. When a man not *claiming* any right or title to the land shall enter on it, he acquires no seizin but by the ouster of him who was seized; and to constitute an ouster of him who was seized, the disseizor must have the actual, exclusive occupation of the land, *claiming* to hold it against him who was seized." *Kennebec v. Springer*, 4 Mass., 416. Mr. Malone says this is the general doctrine in all the States. In support of this the author cites

a large number of cases from our courts of last resort. Real Property Trials, p. 282, and note.

The possession which is necessary to give title under our statute of limitations is a possession under color, taken by the grantee in person or by his agents, and held and *claimed* continuously to the boundaries of his deed, without interruption or relinquishment, for seven years together. *Grant v. Winborne,* 3 N. C., 570, and cases cited in note. This possession or occupancy of the land does not refer to the deed, but to the fact itself and to its *hostile* character. Consequently, it follows that the occupant under color may restrict his constructive possession by his acts and declarations, showing that he does not make his claim of title coextensive with his color of title. In other words, there is no rule of law which will force the occupant to claim possession and title up to the boundaries of his color. He may restrict his claim of occupancy to a part of the land embraced in his color, and the law will not extend his possession, by construction, beyond his claim.

The law is accurately and clearly stated in 1 Cyc., 1134: "Actual possession of a part of the land under color of title will not draw to it constructive possession of the balance, unless such color of title is also accompanied by *claim* of title coextensive with the boundaries of the conveyance." To sustain the text the author cites cases from ten States. "The fact that a person enters under color of title does not dispense with the necessity for a claim of right; constructive possession is dependent, not only on color of title and actual possession of part of the land, but also on a claim of right to the whole." I Am. and Eng. Enc., 867; *Wade v. Johnson,* 94 Ga.; 349; *Parish v. Kaspare,* 109 Ind., 586; *Bakewell v. McKee,* 101 Mo., 337; *Creekmon v. Creekmon,* 75 Va., 430. In the above case the Supreme Court of Georgia declares that "possession of land under color of title, however long continued, will not ripen into a prescriptive title if, in-

stead of being attended with a claim of right, such right be expressly disclaimed pending possession." We could quote from a great array of cases which hold substantially that constructive possession may be restricted by the acts and declarations of the occupant, indicating that he does not make his claim of title coextensive with the boundaries of his color, and some of them hold that to constitute a disseizin constructively by possession under color the occupant must not only be in actual possession of a part of the land covered by his deed, but his possession must be of such character as to indicate affirmatively that he does claim adversely the residue of the land included in it.

We think the rule of law is best stated by the Supreme Court of Vermont in *Brown v. Edson,* 22 Vt., 362, viz.: "But we know of no instance in which a possession by construction has been held to extend beyond the claim of title. We readily grant that an entry under a survey, like the one in the present case, and the occupation of a part of the land, if there be no evidence to limit and restrict the possession, will be regarded as extending the possession constructively over the entire tract included in the survey. But we think this constructive possession may be restricted by the acts and declarations of the occupant, showing that he does not make his claim of title coextensive with the survey."

This is clearly in line with what we conceive to be the law of this State, although there is a dearth of authority upon this exact question in our own reports.

We have said, however, that one entering upon a tract of land under a deed that in form constitutes a color of title and that definitely describes the metes and bounds of the land is *presumed* to prefer claim to all of the land covered by the paper title under which he holds. *Ruffin v. Overby,* 105 N. C., 78. But this presumption in the occupant's favor is clearly not a conclusive presumption, and it may be rebutted by his adversary by proof that, although he is in

actual possession of a portion of the land, he does not claim possession or ownership beyond a certain line.

The testimony objected to is therefore competent to rebut the presumption that plaintiff claimed coextensively with his deed. It is doubtless true that plaintiff, if he made such agreed line, was honestly mistaken in locating his boundary, but the effect would be the same upon his possession beyond that line as if he had knowingly done it. The fact tended to prove a relinquishment of possession and claim, before the statutory period had expired, of the land on the side of the line where the cutting of the timber took place.

His Honor properly submitted the matter to the jury, and we think the appellant's exceptions cannot be sustained.

Affirmed.

DR. SHOOP MEDICINE COMPANY v. J. A. MIZELL & CO.

(Filed 7 October, 1908.)

1. **Contracts in Writing—Parol Evidence—"Vary and Contradict."**

Evidence of an oral stipulation claimed to be made contemporaneously with a written contract, as a part thereof, is incompetent, when in conflict or at variance with the written part.

2. **Same—Sale of Goods.**

When a contract for the sale of goods is evidenced by a paper-writing, specifying that the order therefor is not subject to countermand, that they will be promptly received, on arrival, by the vendee, and that failure to do so will make payment due on demand, and that there is no agreement, verbal or otherwise, affecting the terms of the order, parol evidence is inadmissible which tends to show a contemporaneous oral stipulation, intended to be a part of the contract, but not reduced to writing, that upon failure to sell, after making a reasonable effort, the vendee may return the goods to the vendor at the expiration of a period named.

3. **Same—Omission to Read Contract.**

Evidence in conflict or at variance with the express terms of a written contract is not admissible upon the ground that the party thereto did not read the contract, when there is no sug-

gestion that he was prevented from reading it or that he was put off his guard by any fraud, artifice, deception or other wrongful act of the other party.

4. **Contracts in Writing—Parol Evidence—"Vary or Contradict"—Principal and Agent.**

It is incompetent to show that an agent of one of the parties to a written contract contemporaneously agreed with the other party, by parol, and as a part of the written contract, upon matters contradictory of and at variance with the express statement in writing that there was no such oral agreement.

5. **Contracts in Writing—Principal and Agent—Waiver by Parol—Burden of Proof.**

In order to establish a waiver, by parol, of the express terms of a written contract by an agent of one of the parties, the burden of proof is on the party seeking to establish it.

ACTION tried before *Lyon, J.*, and a jury, at June Term, 1908, of MARTIN.

This action was brought to recover the price of goods sold and delivered to the defendant under a written contract containing the following stipulation: "This order is not subject to countermand, and we will receive said goods promptly on arrival at the station named above. Failure to do so will make this order due on demand. There is no agreement, verbal or otherwise, affecting the terms of this order than is specified herein." The court, over the plaintiff's objection, permitted the defendant to testify that at the time he signed the written contract or order, the agent who sold the goods said he would ship them, and the defendant could keep them for ninety days, and if at the expiration of that time they were unsold he could ship them back to the plaintiff. The court charged the jury that, if the verbal agreement was made by the agent with the defendant, and the latter made a reasonable effort to sell the goods, and, not being able to do so, returned them to the plaintiff at the expiration of the ninety days, they should answer the issue as to the indebtedness in favor of the defendant. The plaintiff excepted to the ruling upon the evidence, and also to the charge. There was a verdict for the

defendant, and, a motion for a new trial by the plaintiff being overruled and judgment entered for the defendant, the plaintiff appealed.

B. A. Critcher for plaintiff.
S. A. Newell for defendant.

WALKER, J. The evidence as to the parol agreement at the time the written contract was executed was incompetent. It contradicted the plain terms of the written instrument, and it is not permissible to do this, even where there is a contemporaneous oral stipulation which was not reduced to writing, although intended to be a part of the contract. The oral must not conflict with the written part of the contract. The subject is fully discussed by us in *Basnight v. Jobbing Co., ante,* 350, where the authorities will be found. See, also, *Walker v. Venters*, next succeeding. It would be useless to point out in what cases oral evidence is competent to fill out a contract, a part of which is in writing, or to explain the contract when ambiguous. This case is governed by the general rule that such evidence will not be received where it contradicts or varies a written contract. It is provided in the order that it is not subject to countermand and that there is no agreement, verbal or otherwise, affecting the terms of the order, which is the contract, except what is specified therein. There is no doubt as to the true meaning of those words. The jury, upon the evidence which was admitted by the court, changed that meaning radically and substituted for the contract, as written by the parties, another and different one.

The defendant testified that he did not read the contract, but signed it, supposing that it was drawn according to the oral understanding. If he did not read it, the fault was his own. He had the opportunity to do so, and his failure to avail himself of it was due solely to his own neglect. He must suffer the consequences of this omission to do what any

prudent man would have done under the circumstances. There is no suggestion that he was prevented from reading the paper or was put off his guard by any fraud, artifice, deception or other wrongful act of the agent. *Dellinger v. Gillespie,* 118 N. C., 737; *Floars v. Insurance Co.,* 144 N. C., at p. 241. Those cases decide that he is bound by the written instrument.

But the evidence was incompetent on another ground: It was offered and admitted to show an oral agreement with the agent, which was contrary to the express statement in the contract that there was no such oral agreement. If the agent had the authority to make the oral agreement, the burden was upon the defendant to show it, even if evidence of such agreement was otherwise competent. *Machine Co. v. Hill,* 136 N. C., 128. There was no evidence of such authority introduced, and if this stipulation can be regarded as one forbidding the agent to make any agreement contrary to what is expressed in the contract, and therefore, one which could be waived, the principal would not be bound by what the agent did. But it is positively stated in the order, as we have said, that there is no agreement, verbal or otherwise, affecting the terms of the order, except the one expressed therein, and to this the defendant freely assented by signing the written instrument. The well-settled rule of the law forbids him now to show the contrary by oral testimony. It was therefore improper to admit the evidence to show that the goods were to be returned, at his option, if not sold within ninety days, as this clearly contradicts the express terms of the contract. *Moffitt v. Maness,* 102 N. C., 457.

New Trial.

A. S. WALKER v. HENRY C. VENTERS.

(Filed 7 October, 1908.)

1. **Contracts in Writing—Mortgagor and Mortgagee—Parol Evidence—Contradiction.**

When the vendee of lands has mortgaged them back to the vendor to secure the purchase price in a sum named, and it is expressly stated in the mortgage that a certain number of bales of cotton, weighing 500 pounds each, should be paid in lieu of said sum, at certain times extending over a period of ten years, the notes secured by the mortgage specifying that payment has to be made in cotton accordingly, evidence is incompetent of a parol agreement, made at the time of the execution of the mortgage, that in event of payment in full at any one time, or of foreclosure, the specified amount was to be paid in money at plaintiff's option, as such would be a contradiction by parol evidence of the terms of a written instrument.

2. **Contracts—Crop Payments—Mortgagor and Mortgagee—Measure of Damages—Interest.**

When, under the express terms of a written contract, the purchase price for certain lands was to have been paid in cotton in certain amounts and at various times, in lieu of an amount specified in the mortgage, upon default, the amount due on the mortgage is the value of the cotton at the market price when each installment fell due, with interest, subject to payments and set-offs, if any.

ACTION tried before *W. R. Allen, J.*, and a jury, at May Term, 1908, of PITT.

Plaintiff appealed.

Julius Brown and *W. O. Howard* for plaintiff.

F. G. James and *Jarvis & Blow* for defendant.

CLARK, C. J. The plaintiff bought a tract of land of the defendant, receiving a conveyance thereof, and, to secure payment of the purchase money, executed a mortgage back to the vendor on said land, which recites:

"Whereas A. S. Walker is justly indebted to Henry C. Venters in the sum of $4,000, the same being the purchase

money of a certain tract of land this day deeded by said Henry C. Venters and wife to A. S. Walker, and described in said deed; and whereas it is agreed that said A. S. Walker shall pay in lieu of said sum of $4,000 and interest thereon 200 bales of cotton, each weighing 500 pounds, as evidenced by ten several cotton bonds of this date, due and payable as follows:" (here follow the recitals and the reconveyance by way of mortgage to secure the delivery of the cotton at the several dates named).

Said bonds are in the following form:

"On or before 31 December, 1900, for value received, I promise to pay to Henry C. Venters or order, for value received, twenty bales of merchantable lint cotton, each weighing 500 pounds. This bond is secured by real estate mortgage of this date. Witness my hand and seal, this 13 October, 1898. "A. S. WALKER. [Seal.]

"Attest: F. C. HARDING."

Some of the bonds were payable to other parties than Venters, but the aggregate quantity to be delivered was 200 bales, twenty bales deliverable each year for ten years.

The plaintiff offered to prove an alleged parol agreement, made at the time the mortgage was executed, that in case of payment in full settlement at one time, or in event of foreclosure, the amount to be paid was to be $4,000 in money, at plaintiff's option. This evidence the court excluded, because it contradicted the written agreement.

This is the only exception requiring consideration. It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides and is not to be set aside upon the slippery memory of man.

The mortgage, duly recorded, and the ten bonds in proof evidence a fully considered and matured agreement to deliver 200 bales of merchantable lint cotton, weighing 500 pounds each, at the rate of twenty of such bales in each year, on dates specified in the mortgage and in the bonds. It is specified that this cotton is agreed to be delivered, without interest, *in lieu of* an original indebtedness of $4,000, bearing interest. This agreement was evidently made because the purchaser was apprehensive that cotton might fall in price, and preferred paying a certain fixed amount in the product of the farm. The vendor was satisfied to take such product, and evidently thought that cotton would go up in price enough to counterbalance the loss of interest which, on payments to be made in ten annual installments, aggregates nearly 33⅓ per cent., and, indeed, more, if the interest on the annual payments is reinvested. At any rate, the parties agreed upon this mode of payment *in lieu of* the indebtedness of $4,000, and to show a contemporaneous parol agreement, notwithstanding, to accept $4,000 in lieu of the cotton stipulated for, would be to contradict, not to explain, the written agreement. Such evidence is never admitted if the wording of the written contract is clear, or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract. This point is clearly discussed, with full citation of authorities, by *Mr. Justice Walker* in *Basnight v. Jobbing Co., ante,* 350. Nothing more need be added.

The court further charged that the amount due on the mortgage is the value of twenty bales of cotton at the market price when each installment fell due, with interest, subject to payments and set-offs, if any. This was correct. The other exceptions do not require discussion.

No Error.

JOHN A. POYTHRESS v. DURHAM AND SOUTHERN RAILWAY COMPANY.

(Filed 7 October, 1908.)

1. Carriers of Goods—Liability—Notice to Consignee—Reasonable Time to Remove—Warehousemen.

The liability of a common carrier continues until notice is given consignee of arrival of shipment of goods at destination and a reasonable time given to remove it. Thereafter the carrier's liability is that of a warehouseman.

2. Same—Requirements of Notice.

Notice of the arrival of a shipment of goods, to relieve the carrier of liability as such, need not be served personally on the consignee by the carrier. The requirements of Rule 1 of the Corporation Commission are applicable: "Notice shall be given by delivering same in writing, in person or by leaving it at consignee's place of business or by depositing it in the post office."

3. Pleadings—Demurrer—Cause Defectively Stated—Amendments.

A demurrer will not be sustained to a complaint merely because a cause of action is defectively stated, which may easily be remedied by amendment, if necessary.

ACTION heard on demurrer to complaint, by *Cooke, J.*, at May Term, 1908, of VANCE, to recover the value of a moving-picture outfit alleged to have been destroyed in the warehouse of the defendant on the evening of 6 June, 1907.

The complaint contains two causes of action—one charging the defendant as a common carrier and a second count charging it as a warehouseman. The defendant demurred to both causes of action. From a judgment overruling the demurrer the defendant appealed.

A. C. Zollicoffer and *J. H. Bridgers* for plaintiff.
F. L. Fuller and *T. T. Hicks* for defendant.

BROWN, J. The facts alleged in the first cause of action, which, for the purposes of the hearing only, are admitted by the demurrer to be true, appear to be substantially as follows: "That on 6 June, 1907, the plaintiff delivered to the de-

fendant, in good condition, at its station in Dunn, two boxes, containing a moving-picture outfit, consigned to the plaintiff, at Duke, N. C., a station on defendant's road, which boxes and contents the defendant agreed to safely transport and deliver to plaintiff at destination; that they arrived at Duke on the same day, late in the evening—too late for plaintiff to remove the same on that day; that soon after the arrival of the boxes at Duke, N. C., on the same evening, 6 June, 1907, after deposit of the same in defendant's warehouse and before plaintiff had been notified of their arrival or had time to remove the same, the boxes were destroyed by fire." The question raised by the demurrer is one which has been much debated by jurists, and about which they are not agreed, as to when the liability of a common carrier of freight ends and its liability as a warehouseman begins. Some courts hold that when the transit is ended and the goods deposited in the warehouse of the carrier the liability as such terminates and the more modified liability of warehouseman begins. The leading case in this country entertaining that view is from the Massachusetts Court, *Norway Plains Co. v. Railroad*, 61 Am. Dec., 423, where the subject is considered at length by *Chief Justice Shaw*. A comprehensive note, citing many cases, is to be found to the case of *Schmidt v. Blood*, 24 Am. Dec., 145, which cites authorities taking the same view.

Another class of cases holds that placing the goods in the warehouse alone does not discharge the company from its liability as a common carrier until the consignee has had reasonable time after their arrival to inspect and take them away in the ordinary course of business. The leading case holding this view was decided, in a very elaborate opinion, upon almost the same state of facts as the *Norway Plains case*, by the Supreme Court of New Hampshire (*Moses v. Railroad*, 32 N. H., 523). *Wood v. Crackle*, 18 Wis., 345; *Rail-*

road v. Ayres, 5 Dutch., 393; *Blumenthal v. Brainerd,* 38 Vt., 413, support the New Hampshire rule.

And still there is another class of cases which hold that the liability of the company as carrier continues until the consignee has been notified of the arrival of the goods and has had a reasonable time in the ordinary course of business within which to remove them. This view is maintained by *Judge Cooley,* in a most elaborate and able opinion, in *McMullan v. Railroad,* 16 Mich., 100, concurred in by his eminent associate, *Judge Christiancy.* In that case the Michigan Court was equally divided, the Chief Justice and *Mr. Justice Campbell* holding that notice was not necessary and that the company was liable only as a warehouseman when the goods had been deposited in its warehouse.

In 1905 the Supreme Court of Michigan unanimously adopted the views of *Cooley* and *Christiancy* in the case of *Walters v. Railroad,* 139 Mich., 303. This view is also supported by *McDonald v. W. R. R. Corp.,* 34 N. Y., where the Court of Appeals of New York says: "In those cases, according to the weight of authority in this State, notice to the owner or consignee of the arrival of goods, and a reasonable time and opportunity after notice to remove them, would come in lieu of personal delivery, so far as to change the strict liability of the carrier to that of a warehouseman." See, also, 2 Parsons on Cont. (5th Ed.), 189; Ang. on Carriers, sec. 313; Chitley on Carriers, 90; *Pinney v. Railroad,* 19 Minn., 251; *Railroad v. Fuqua,* 84 Miss., 490; *Railroad v. Hatch,* 52 Ohio St. In the States of Alabama, California, Tennessee and Texas the law is made to practically conform to this latter view by statute, as shown by adjudication of the Courts. *Collins v. Railroad,* 104 Ala., 390; *Wilson v. Railroad,* 94 Cal., 166; *Railroad v. Naive,* 112 Tenn., 239; *Railroad v. Haynes,* 72 Tex., 175.

Not only does the great weight of authority in this country sustain the view of *Judge Cooley,* but such is the English

and Canadian law. *Mitchell v. Railroad,* 10 L. R., Q. B., 256; *Chapman v. Railroad.* 5 Q. B. D., 278; *Richardson v. Railroad.* 10 Ont. Rep., 369; 45 Am. and Eng. Ry. Cases, 413. Mr. Hutchinson, referring to the English law on this subject, says: "No trace is there to be found of the distinction which has been made in this country in favor of railway companies, as common carriers, which converts them into mere warehousemen, without notice to the consignee. Notice, it is there held, is necessary to effect this change of character and liability; and after such notice, if the consignee fails to call for the goods, the carrier becomes, as to them, a warehouseman merely. And it is to be gathered from the cases that it is the universal course of business there, with this class of carriers, either to deliver personally or to send to the consignees what are there denominated advice notes, informing them of the arrival of the goods; and that until this is done the company remains subject to the liability of a common carrier." 2 Hutchinson on Carriers, p. 792. See, also, 4 Elliott, p. 146, where the cases are collected, showing that most of the courts of this country follow the English precedents.

The rule subjecting common carriers to this strict responsibility as insurers is founded on broad principles of public policy and convenience, and, as said by Chancellor Kent, "It was introduced to prevent the necessity of going into circumstances impossible to be unraveled." 2 Kent Com., 602. "It is a politic establishment," says *Lord Chief Justice Holt,* in his celebrated judgment in *Coggs v. Bernard,* 2 Lord Raymond, 918, "contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust to these sort of persons, that they may be safe in their ways of dealings; for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, etc., and yet doing it in such a clandestine way as would not be possible to be discovered." Of

course, the danger from loss by collusion is not near so great in these days as in the semibarbarous times, but upon this point it is well said by the Supreme Court of New Hampshire, in *Moses v. Railroad,* 24 N. H., 71, and again in 32 N. H., 523: "The immense increase of the business, the great value of the commodities now necessarily entrusted to the charge of the common carriers, and the vast distances to which they are to be transported, have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have greatly added to the opportunities and temptations of the carrier who might be disposed to neglect or violate his trust." The reasons upon which the rule is founded continue to apply in full force to railway companies as common carriers, and any relaxation of it must be attended only with mischief. These reasons, founded on a sound public policy, require not only that the carrier shall be held as an insurer during transit, but until he has notified the consignee of the arrival of the goods at the point of destination, and until he shall have had a reasonable time to effect their removal. The notice need not be served personally on the consignee. It is sufficient if deposited in the post office, addressed to him, as is provided in the regulations of the Corporation Commission, which provide: "Notice shall be given by delivering same in writing, in person or by leaving same at consignee's place of business or by depositing it in the post office." Rule 1. After service or deposit of the notice the consignee is allowed a reasonable time within which to take his goods away. If he fails to do so, the liability of the company as a common carrier terminates and its less stringent liability as a warehouseman begins.

What length of time will be considered reasonable for the removal of the goods is a question not now presented. It may, however, be said that no fixed or definite rule can be laid down, but it must depend in great measure upon the circumstances of each case. When the facts are undisputed,

it becomes a question to be determined by the court, as one of law; but where they are disputed and unsettled, the question must be submitted to a jury. *Roth v. Railroad,* 34 N. Y., 548; *Lemke v. Railroad,* 39 Wis., 449; Hutchinson on Carriers, p. 796, and cases cited in note.

We do not think that this question was presented or has heretofore been determined by this Court in the case of *Alexander v. Railroad,* 144 N. C., p. 98, or by any other case that has been called to our attention or that we have been able to find.

Our decision renders it unnecessary that we consider the demurrer to the second cause of action. Suffice it to say that we think a cause of action is defectively stated in it, and may be easily remedied by amendment, if necessary.

The defendant will answer over. The ruling of the Superior Court is

Affirmed.

WALTER H. BRISCOE v. HENDERSON LIGHTING AND POWER COMPANY.

(Filed 14 October, 1908.)

Trespassers—Personal Injury—Children—Invitation, Expressed or Implied—Pleadings—Demurrer.

Owners in possession of lands are not liable to trespassers for injuries received from conditions arising from the lawful use thereof for manufacturing or other lawful purposes; and a complaint alleging that the electrical plant on defendant's premises was alluring or attractive to boys, and the plaintiff, a boy of thirteen years of age, was injured while going through an opening between two buildings on defendant's lands by falling into a well of hot water negligently covered over, used in the conduct of defendant's business, and there is no allegation that boys usually passed the place where the injury was occasioned or were in the habit of frequenting the defendant's premises on account of its attractiveness, or that invitation, expressed or implied, had been extended by defendant, the plaintiff was a trespasser, and defendant is not responsible for his act thereof, and a demurrer will be sustained.

ACTION heard upon demurrer to the complaint, by *Cooke, J.*, at May Term, 1908, of VANCE.

The plaintiff, suing by his next friend, alleges that the defendant is a duly chartered corporation, engaged in supplying light to the inhabitants of Henderson, N. C., and heat and power to some of them; that the defendant has and operates its light and power and heating plant on Spring Street, very near Main Street, of the town of Henderson, in a populous part of the said town, where there is much passing; that the defendant has and operates a large, attractive brick building, very large dynamos, shaftings, and pulleys, engines and boilers, and by means of large doors and windows these machines may be seen from the street, the railway tracks and the alley near by; that Spring Street crosses Main Street at a point 114 feet from defendant's said plant; that defendant's manager, Mr. Woodsworth, lives on the corner made by the intersection of said streets, his residence lot being 61½ feet on Main Street and 114 on Spring Street; that next to his lot is the Grand Theatre, on a lot 54 feet on Main Street and running back 110 feet; that the light and power plant extends from Spring Street across or along the rear of these two lots, and the space between the power plant building and the rear of Mr. Woodsworth's lot, which is enclosed by a high fence, and the rear wall of the Grand Theatre forms an alleyway about .... feet wide, extending from Spring Street, at a point near the Southern depot, to an open lot, which extends around the north side of the theatre building to Main Street; that this open alleyway is the property of, or in the possession and control of, the defendant; that the said theatre building and the residence of the said manager are heated or warmed by hot air, or steam, or hot water, supplied by pipes extending underground from engines in defendant's power plant across said alley into said buildings; that just on the edge of said alleyway, and next to the manager's fence and the theatre building, are three small wells or receptacles sev-

eral feet deep, into which the hot water from the heating pipes of said plant escapes; that these wells are filled or nearly filled all of the time with very hot water, and that this condition existed at the time hereinafter referred to; that the defendant, in the month of October, 1907, unlawfully, negligently, carelessly and wrongfully permitted said alleyway to remain open in immediate proximity to Spring Street, and did unlawfully, wrongfully and negligently fail to cover up securely or in any manner guard one of said hot water wells, but unlawfully covered or permitted to be covered the said well with a thin and weak covering, which the plaintiff believes was a banana case; that the plaintiff, being only a small boy, with the intelligence usual in boys of his age, in passing through said alleyway at said time, did not and could not see the well or hole of hot water aforesaid, or know that it was under the thin, weak piece of wood, and, not having been guarded or cautioned against it, stepped upon the thin wood covering, which instantly gave way and precipitated plaintiff into said hole or well of hot water, which instantly, before he could extricate himself, burned and scalded the plaintiff's right foot and leg, so that the skin and parts of the flesh came off, and the remaining flesh was lacerated and wounded and made dangerously sore from the bottom of the foot to three inches above the knee, and the plaintiff suffered great pain and anguish of body for a long time and was put to great cost and expense for nursing and for medicines and for attendance and services of a physician, to the plaintiff's damage of $2,000.

The plaintiff further alleges that the entrances to the engine rooms and the power house and the theatre were in said alley, and the machinery, being constantly in motion, was calculated to attract and allure boys and others to see the machinery and what may be seen in the theatre, and the defendant was negligent and at fault in permitting said wells to remain in said alleyway, uncovered or defectively covered, and such neg-

ligence was the direct and proximate cause of the plaintiff's great injury and suffering.

The defendant demurred to the complaint, for that it did not state facts sufficient to constitute a cause of action, in that it did not allege or appear:

1. That the defendant owed the plaintiff or the public the duty of keeping said alleyway (so-called) on or across its own premises open or free from obstruction, so as to be used by the public, or that defendant owed the plaintiff any special duty whatsoever.

2. That the plaintiff or the public had any right to go upon the premises of the defendant or upon the alleyway, or to use the same for any purpose whatsoever.

3. That the alleyway was used by the plaintiff or the public, or that defendant knew that the plaintiff was in the habit of going on said premises or had ever invited him there.

4. That the defendant knew that the alleged alleyway was a common resort of children of tender years, in which to congregate and play, or that defendant was guilty of any act constituting negligence.

For that it did appear from the allegations of the complaint:

5. That the open alleyway, where the plaintiff alleges he was injured, was the private property of the defendant, and that defendant was in the possession and control thereof, and was using the same for the purposes permitted in its charter.

6. That the plaintiff was a trespasser upon the premises of the defendant and was of such age as to be guilty of contributory negligence, and that the injury of which he complains was due to his own negligence and not to the negligence of defendant.

His Honor overruled the demurrer and gave defendant time to file answer. Defendant excepted and appealed.

T. T. Hicks and *J. C. Kittrell* for plaintiff.

A. C. Zollicoffer and *J. H. Bridgers* for defendant.

CONNOR, J. The diagram attached to the complaint shows that the defendant's power house and engine room are located on Spring Street, which intersects with Main Street. The manager's residence fronts on Main Street. At its intersection with Spring Street, adjacent to the dwelling, fronting on Main Street, is the theatre, and adjacent thereto is an open or vacant lot. In the rear of the dwelling there is a high fence. Between this fence and the power and engine house is a vacant space, called in the complaint an "alleyway," opening on Spring Street and extending the distance of the width of the power and engine house on one side and the dwelling and theatre on the other, and finding an outlet into the vacant lot. The width of this alleyway is not given, but the depth of the lot upon which the dwelling is located is 114 feet from the corner of Main Street. In the space or alleyway the defendant has dug three small wells or receptacles several feet deep, into which the hot water from the heating pipes escapes. "The dwelling and the theatre are heated by hot air or steam, supplied by pipes extending underground from defendant's engines across said alleyway into said buildings." The wells are usually full of hot water. The distance of the wells from Spring Street is not given, but from the map it appears that the one into which plaintiff fell is about sixty-two feet from said street and just back of the rear wall of the theatre. For the purpose of operating its business of supplying light to the city of Henderson the defendant has erected "a large, attractive, brick building, very large dynamos, shaftings and pulleys, engines and boilers, and by means of large doors and windows these machines may be seen from the streets, the railway tracks and the alley near by." It is further alleged that the entrances to the power and engine rooms are in the said alleyway, and "the machinery, being constantly in motion, is calculated to attract and allure boys and others to see the machinery and what may be seen in the theatre." Plaintiff, a boy of thirteen,

"with the intelligence usual in boys of said age," passing through said alleyway in October, 1907, not knowing or being warned of the existence of said wells, and the one in controversy not being securely covered, stepped into it and was injured. The negligence alleged is not covering up securely or in anyway guarding "one of said wells," but permitting it to be covered with a thin, weak covering, etc. The demurrer is based upon the failure of the plaintiff to allege any facts showing that defendant owed him any duty in respect to placing, using or covering the wells upon its premises. The plaintiff does not allege that the space called an "alleyway" was ever used or intended to be used either as a public or private way for passing upon or over defendant's premises, nor does he allege that he ever so used it. He does not allege the purpose for which he entered upon the premises or that any relation existed between defendant and himself entitling him to enter upon the alleyway. For the purpose of bringing himself within a class of cases decided by the courts imposing a higher degree of care upon persons having upon their premises structures or other things which are calculated to attract children, he says that "the machinery, being constantly in motion, is calculated to attract and allure boys," etc., "to see the machinery and what may be in the theatre." He does not allege that boys were ever in fact allowed to go into the alleyway for either purpose, or that he was so attracted or allured. It appears from the complaint that the alleyway belonged to and was under the control of defendant, and that the premises were being used for a lawful purpose, and that the wells were useful and necessary for such purpose.

The liability of owners of premises adjacent to the public highways for injuries sustained by persons using such highways, by reason of obstructions or pits placed so near thereto as to render them dangerous, is well settled. *Bunch v. Edenton*, 90 N. C., 431; *Walker v. Reidsville*, 96 N. C., 382. No question of that kind is presented by the complaint, because

it is not alleged that plaintiff, while using the highway, fell into the well. He expressly negatives this suggestion by saying that "in passing through said alleyway" he was injured. The well was sixty-two feet from the street. While the term "alleyway" is used to describe the space upon which the wells were dug, plaintiff does not allege that it was used by the public or that the public were, either expressly or impliedly, invited to use it as a public passway, or that any persons so used it. The use of the term "alleyway" does not of itself imply that the strip of land was dedicated to the public use. *Milliken v. Denny,* 135 N. C., 19. One may well use a portion of his private lot as an alley for domestic purposes or a manufacturing establishment or, as in this case, an electric light plant, for uses connected with his or its business, without subjecting it to a public use. Of course, if, when so used, its servants or others who are invited or entitled to pass over it are injured by pitfalls or obstructions placed there, the owner of the premises is liable. This liability arises out of the duty imposed upon the owner by reason of his relation to his employee or licensee. As we construe the language of the complaint, the defendant did not by leaving the space on Spring Street open invite or grant any license to the public or to the plaintiff to enter upon or pass over the open space or alleyway. He was a trespasser upon the defendant's premises. The liability to him for injuries sustained, therefore, depends upon the measure of duty which it owed to him.

We had occasion at the last term to consider this question in *McGhee v. Railroad,* 147 N. C., 142. After a careful reexamination of the question, in the light of numerous well-considered authorities, we see no reason to change our opinion as expressed in that case. In view of the adoption of the "stock law" in this State, and the custom generally prevailing in our towns of dispensing with fences around lots, the question becomes of more practical importance with us than heretofore. It would impose an unreasonable burden upon the owners of

cultivated lands and of lots in towns to require them to guard every pathway or alley used for their own convenience against the intrusion of trespassers or, in default thereof, be held liable for every injury sustained in passing over their premises or through their property. We do not find that any court has so held. In *Sweeny v. Railroad*, 10 Allen Mass., 386, it is said: "The owner of land is not bound to protect or provide safeguards for wrongdoers. * * * No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied or by some preparation or adaptation of the place for the use of customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." In *U. S. Y. & T. Co. v. Rourke*, 10 Ill. App., 474, *Bailey, J.*, says: "It is a general rule of law that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees or others who come upon them, not by any invitation, either express or implied, but for their own convenience or pleasure or to gratify their curiosity, however innocent or laudable their purpose may be." In this case the deceased, while passing over defendant's premises, "without any invitation from the defendant, express or implied, and without any legal right," was injured. There was evidence that other persons were in the habit of passing over the premises, for their own convenience, without any objection on the part of defendant. It was held that defendant was not liable. In *Cooper v. Overton*, 102 Tenn., 211 (73 Am. St. Rep., 864), the Court said: "There can be no liability, unless it was the defendant's duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of per-

sons going upon his land who have no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold." In *Moran v. Pullman Palace Car Co.,* 134 Mo., 641, *Sherwood, J.,* after discussing the allegations of the complaint, says: "The petition, we think, fails to state a cause of action against defendants, and the demurrers were rightly sustained. The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water or a dangerous excavation, is required to fence it or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity," citing *Reebards v. Connells,* 63 N. W., 915, and many others sustaining a demurrer. In that case it appeared that boys had been in the habit of bathing in the pond. There was "a sudden depression, making the water some fifteen feet deep." A boy of nine years was drowned by going into the depression. In *Railroad v. Bingham,* 29 Ohio St., 364, *Boynton, J.,* after reviewing the authorities, thus sums up his conclusion: "The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same, without liability to others for injuries occasioned by its unsafe condition, when the person receiving an injury was not in or near the place of danger by lawful right, and when such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided."

In such cases the maxim, *Sic utere ut alienum non lædas,* is in no sense infringed. In its just sense it means, "So use your own property as not to injure the *rights* of another." When no right has been invaded, although one may have injured another, no liability has been incurred. "Actionable negligence exists only when the one whose act causes or occasions the injury owes to the injured party a duty, created

either by contract or operation of law, which he has failed to discharge." The inducement to enter must be equivalent to an invitation. Mere permission is neither inducement, allurement nor enticement. *Carlton v. Iron and Steel Co.*, 99 Mass., 216. The principle, with its limitations, is clearly stated by *Martin, B.*, in *Hardcastle v. Railroad*, 4 Hurls. & N., 67: "When an excavation is made adjoining a public highway, so that a man walking on it might by making a false step or being affected with sudden giddiness fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different." *Grumlich v. Warst*, 86 Penn. St., 74. These and many other cases which might be cited recognize certain well-established exceptions to the general rule.

The plaintiff seeks to bring himself in the exception which imposes a duty upon the owner of premises who creates or permits conditions calculated to attract children to enter and expose themselves to danger to properly guard them against danger. He says that "the machinery, being constantly in motion, is calculated to attract and allure boys to see the machinery *and* what may be seen in the theatre," and for this reason he says the defendant owed him the duty to securely cover the well, and that his failure to do so was the proximate cause of his injury. It will be noted that he does not say that he was in fact allured or attracted by the moving machinery or by what might be seen in the theatre, but was injured "in passing through the alleyway." In *Lynch v. Nordin*, 41 E. C. L., 422, it was held that when the defendant's servant left a horse harnessed to a cart, standing unhitched in the public streets, and some children near by, being attracted to it, climbed upon the cart, and the horse, moving off, injured plaintiff, defendant was liable. This was put

upon the ground that it was negligence to leave the horse unhitched upon the street and was calculated to attract the attention of children, which fact should have been anticipated by the owner or his servant in charge of the horse. It was conceded that the children were trespassers in getting upon the cart, but held that the conditions were such as imposed upon the defendant the duty of prevision. The case was recognized as "sound law" and cited by the Supreme Court of the United States in *Railroad v. Stout*, 84 U. S., 657, generally referred to in the books as the *"Turntable case."* It was there said that the turntable, although on the right of way or land of the company, was calculated to attract children, and that their childish propensity to play upon such a structure was or should have been anticipated by the company, imposing upon it the duty to the children of locking or otherwise securing it when not in use. In *Kramer v. Railroad*, 127 N. C., 330, this Court held the defendant liable for injuries sustained by a child while playing upon cross-ties piled in the street of the town of Marion. *Montgomery, J.*, said: "If the cross-ties had been piled upon defendant's own premises instead of in the street, and the defendant had no actual knowledge that children were in the habit of playing on the ties, the law would have imposed no duty upon the defendant to look out for their safety by having the ties piled with that end in view." After noting the *Stout case, supra*, the learned Justice says: "These cases are exceptions to the general rule, and went to the very limit of the law. Mere attractiveness of premises to children will not bring a case within that exceptional doctrine." In *Stendal v. Boyd*, 73 Minn., 53, the defendant, the owner of an uninclosed lot, had made an excavation, which was a dangerous place for children who were accustomed to go there to play, and had been notified that a child had fallen into the pond. Plaintiff's intestate, a child of about five years of age, while playing with other children at a place twelve or fifteen feet from the street, fell

in the pond and was drowned. The Court said that, while it had in a former case followed the *Turntable case,* the doctrine was an exception to the rule of nonliability for accidents from visible causes to trespassers upon his premises.

If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises childproof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must on the same principle guard a natural pond, etc. The courts which have adopted the doctrine of the *Turntable case* have uniformly held that it was not to be extended to other structures or conditions. A number of highly respectable courts have rejected it as unsound. In *Turess v. Railroad,* 61 N. J. L., 314, *Magie, C. J.,* in a well-considered opinion, reviews the cases and examines the doctrine upon the reason of the thing. After stating the doctrine and the basis upon which it is placed, he says: "It is obvious that the principle on which it rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery or implement maintained by them which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower, capable of being climbed, and maintains thereon a windmill to pump water to his buildings—he who maintains a pond in which boys may swim in summer or on which they may skate in winter—would seem to be amenable to this rule of duty. * * * In all of them the doctrine of the *Turntable case,* if correct, would charge the landowner or occupier with the duty of taking ordinary care to preserve young children thus tempted on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases to which the idea of such a duty is novel and startling, raises

a strong suspicion of the correctness of the doctrine and leads us to question it." The illustration given by the learned Chief Justice shows that he has had experience with towers constructed to support windmills, with ladders leading to the tank, and with boys. He further says that the only rational ground upon which the doctrine can be founded is that having a thing attractive to children on his land is an implied invitation to children to come upon his premises and play upon them, in, around and upon such thing. After showing conclusively that the liability cannot rest upon an implied invitation, he says: "A turntable, however attractive, could not be deemed to have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults, * * * for it is not a question of the child's negligence, but a question of the duty of the railroad company towards the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turntable was designed for the use he makes of it, which is, of course, absurd." The Supreme Court of New Hampshire, in *Frost v. Railroad,* 64 N. H., 220, expressly rejects the doctrine, saying: "We are not prepared to adopt the doctrine of *Stout's case* and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of infant trespassers." In *Daniels v. Railroad,* 154 Mass., 349, the same conclusion is reached, after a careful examination of the authorities, by *Lathrop, J.* In *Walsh v. Railroad,* 145 N. Y., 301, *Peckham, J.,* reviews the cases and, for a unanimous Court, holds that defendant is not liable. *Pekin v. McMahon,* 154 Ill., 141. In *Railroad v. McDonald,* 154 U. S., 262, the Court adheres to the doctrine of the *Stout case.* In *Keffe v. Rail-*

road, 21 Minn., 207, the complaint alleged that "the defendant knew, also, that many children were in the habit of going upon the turntable to play." The latest discussion of the subject is to be found in *Walker v. Railroad,* 105 Va., 226 (53 S. E., 113); 4 L. R. A., N. S., 80, by *Buchanan, J.* After a careful examination of the decided cases, the learned Justice rejects the doctrine of the *Turntable case,* conceding that "there is a remarkable conflict of authority upon the subject." We have noticed this line of cases, not for the purpose of closing the question as applied to turntables in this Court, but to ascertain the basic principle upon which it was originally founded and the basis of the criticism made of it by other courts. If liability arises in this particular class of cases, it must be because of some principle of the common law applicable to other cases governed by the same reason. Courts guided by the principles of the common law will not arbitrarily select one special object, like a turntable, and fix liability for injuries to children upon it, and refuse to carry the principle to its logical result in other cases. The Court, in *Stout's case,* failed to state the principle upon which it held the defendant liable, but was content to rely largely upon the well-known case of *Lynch v. Nordin.* As has been pointed out by several courts, in that case the horse and cart were left in the street unhitched. This was negligence *per se.* *Lord Denman* rested his opinion upon the ground that the defendant should have foreseen that children would be attracted to the horse and cart, etc. There was no suggestion that leaving it unhitched was an implied invitation to drive it away. On the contrary, it was conceded that the children were trespassers. It is manifest that if the liability rests upon the theory that a turntable or other dangerous machinery or ponds, excavations, structures, etc., on one's own premises, attractive to children, constitutes an implied invitation to them to enter and play with or upon them, the children are not trespassers or mere licensees, but come upon the premises with all of the rights on

their part and duties on the part of the owner of the premises attaching to that relation. Again, if this be the principle, it is impossible to put any limit upon it other than to include such things as either the child, the court or the jury may regard as attractive or alluring. "The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is in effect an invitation. Such an assumption is not warranted." *Gummere, J.*, in *Railroad v. Reich*, 61 N. J. L., 635. The difference between a temptation to commit a trespass and an invitation to come upon one's premises is pointed out by *Mr. Justice Holmes* in *Holbrook v. Aldrich*, 168 Mass., 16. These cases are cited with approval by *Buchanan, J.*, in *Walker's case, supra.*

The present case illustrates the fallacy of the theory of implied invitation. Would it ever occur to any reasonable mind that constructing the building with large windows and doors, placing in it the engines, dynamos and other machinery and keeping them constantly in motion for the purpose of discharging its corporate functions and duties, however attractive to small boys, was an invitation to them to make the premises a playground? To adopt the suggestion carries us too far afield for the practical affairs of life and violates manifest truth. *Judge Buchanan* thus clearly and forcibly illustrates the fallacy of it: "No landowner supposes for a moment that by growing fruit trees near the highway or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful,

but which are attractive to children and may expose them to danger if they should yield to the attractiveness, is by that act alone inviting them upon his premises. The doctrine of implied invitation is not sustained by the English cases and has been utterly rejected by the highest courts of a number of States.

It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury. The principle is well stated in 21 Am. and Eng. Enc., 473, and was cited with approval in *McGhee's case, supra*. "A party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon." Immediately following this language the editor says: "The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been anticipated is well applied in the rule of numerous cases, that one who

maintains dangerous implements or appliances on uninclosed premises of a nature likely to attract children in play, or permits dangerous conditions to exist thereon is liable to a child who is so injured, though a trespasser at the time when the injuries are received; and, with stronger reason, when the presence of a child trespasser is actually known to a party or when such presence would have been known had reasonable care been exercised. * * * But when, under the circumstances, the presence of children on the premises was not reasonably to have been anticipated, there is, of course, no duty as to such persons to have the premises safe. And likewise when, though children might have been expected to come upon the property, no injuries to them should reasonably have been contemplated, under the circumstances, there is no negligence and consequently no liability." Cases are cited which sustain these propositions. We think this the correct principle upon which the liability should rest. As said in *Kramer's case, supra,* "Mere attractiveness of premises will not bring a case within the exceptional doctrine."

To allege simply that the machinery, including dynamos, engines, etc., in an attractive building in the populous portion of a city "is calculated to attract and allure boys and others to see the machinery" does not bring the case within the exception to the general principle. There is no suggestion that any boys had been "attracted or allured," nor is it even averred that the plaintiff was on the premises to see the machinery. On the contrary, the map shows that the location of the well into which he fell was on the side of the alleyway opposite the machinery. It is not easy to see how at that place the plaintiff could have seen the machinery. Again, there could be no possible danger in looking at the machinery. The attractive building had large windows and doors, through which "those machines may be seen from the street" and other points. The case is in some respects similar to *Schmidt v. Distilling Co.*, 90 Mo., 284, in which a child was scalded by

falling into a pit or well into which pipes carrying hot water emptied. The Court, after stating the general principle, says: "The evidence in this case does not show that the escape pipe at its outlet on defendant's premises or the place into which it discharged the boiling water was attractive to children. * * * There is no evidence that children were in the habit of resorting to this place for amusement or otherwise." We have not overlooked the allegation that the moving machinery was calculated to attract and allure boys to see the machinery and "what may be seen in the theatre." The theatre fronts on Main Street. Its rear wall abuts on the alleyway. Just how the machinery, 114 feet from the front of the theatre, is calculated to allure boys to see "what may be seen" therein is not made clear by the complaint. We do not suppose that the learned counsel seriously contend that the defendant invited the plaintiff, a boy of thirteen years, to look in the back windows of a theatre, or that it could have reasonably anticipated that he would do so, when he fails to even suggest that in truth he was doing so when he fell into the well. We have no disposition to narrow the limits of liability of owners of premises for injuries sustained by a breach of duty to young children, but, as in all other cases of alleged negligence, it must appear that a duty is imposed upon the defendant and that by reason of its breach plaintiff was injured. Legal rights and liabilities must rest upon some reasonably settled basis, fixed either by the common law or by statute. As was well said by *Judge Buchanan*, "While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create new principles or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of needed laws is the province of the Legislature and not the judicial department of the government." The complaint fails to show that defendant has violated any legal duty to plaintiff imposed by the law.

Again, in the numerous cases which we have examined we do not find any in which a boy of thirteen years, "with the usual intelligence of boys of that age," has been permitted to rely upon the attractive allurements of machinery to children. It is not stated whether the injury was sustained at night or in the daytime. If, as suggested on the argument, the plaintiff was allured by the desire to see what was going on in the rear end of the theatre, it would be carrying the doctrine of "reasonable anticipation" far beyond any case found in the books to hold defendant liable. Theatres are to be "seen into" from the front door.

We have not overlooked the authorities cited by plaintiff's counsel. Those in which liability is fixed upon the authority of the *"Spring gun" cases* are obviously distinguished from this. We have discussed the *"Turntable cases."* There is undoubtedly some conflict in the numerous cases found in the reports. We have not overlooked the fact that the well was insecurely covered. In our view, the defendant did not owe any duty to plaintiff to cover the well at all, as it was under no obligation to anticipate that he would come upon its premises. If, as we hold, he was an unexpected trespasser and not within the exception to the general rule, it was his duty to look out for danger, and not the duty of defendant to provide against danger. We are of the opinion that the demurrer should have been sustained.

It is, of course, understood that we are discussing the defendant's liability upon the principles of the common law. If, as is frequently done, the municipal authorities deem the conditions described dangerous to the public, they may by appropriate ordinances require the owners to guard or fence the premises. In this way the conditions are met without imposing unreasonable burdens upon property owners. In the majority of the large towns in the State the residential and business lots are open—fences have been removed. Probably in a large majority of them, at times, conditions exist—

wood piles, coal bins, flower pits, barrels for receiving sewage, and many others—which are dangerous to persons passing over them at night. To impose upon the owners the burden of prevision, in the absence of any suggestion that by acquiescence or otherwise they had given a license to trespassers, would imperil the property of innocent persons. We have discussed the case at more than usual length because of its importance to the public and because the questions presented have not heretofore been decided by this Court. This decision will be certified to the Superior Court of Vance, to the end that further proceedings may be had in accordance with the course and practice of the court.

Error.

S. D. TAYLOR v. F. T. MILLS & SON.

(Filed 14 October, 1908.)

Mortgagor and Mortgagee—Sale of Mortgaged Property—Purchaser—Surrender in Law—Measures of Damages—Questions for Jury.

Defendant represented to plaintiff that he had a mortgage on a certain horse plaintiff had bought, whereupon plaintiff replied that if the horse was defendant's property he could go and get him. This the defendant afterwards did in plaintiff's absence. Subsequently plaintiff ascertained that defendant's mortgage had not been registered at the time of his purchase, and brought claim and delivery proceedings. Defendant replevied and then sold the horse: *Held*, (1) that defendant's taking the horse under the circumstances was not a surrender in law by the plaintiff; (2) that the question of laches as to defendant's registering the mortgage has no application, as he should have retained the possession until the mortgage was registered; (3) that the amount of recovery should be the value of the horse at the time it was wrongfully taken, with interest therefrom, and the amount paid for the horse by plaintiff was only to be considered by the jury upon the question of such value.

ACTION heard before *Biggs, J.*, and a jury, at December Term, 1908, of NEW HANOVER.

Defendants appealed.

B. G. Empie for plaintiff.

Herbert McClammy for defendants.

CLARK, C. J. The defendants sold a horse, buggy and harness to one Fisher, on 10 June, and took a mortgage thereon. The next day Fisher sold them to the plaintiff for $125. On 12 June the defendant learned that the plaintiff had bought them, and told plaintiff that they were his property. The plaintiff replied that if they were defendant's property he could come and get them. The defendant sent and got them in plaintiff's absence, the messenger telling the plaintiff's wife her husband had sent him for them, which was not true. Learning that defendants' claim was based on an unregistered mortgage, the plaintiff demanded possession of the property, and on refusal began this action, on 14 June, for claim and delivery of the property, and the papers were served the same day. The mortgage was registered thereafter, on 18 June. The jury found that the plaintiff was owner of the property, that it was worth $150, and that the plaintiff was entitled to recover as damages for the detention interest on said sum from 12 June, the date when defendants took the horse. The horse was replevied by the defendants and has been since sold by them.

The defendants appealed from the verdict and judgment, assigning as error:

1. That, the plaintiff having admitted the horse was the property of the defendants and authorized the defendant to get it, there was a surrender in law.

Such is not the evidence. The plaintiff said, on defendant's statement, that if it was defendant's property he could get it. The horse was taken in his absence and without his authority, according to the testimony.

2. That if the defendant used due diligence in recording the mortgage, and there was not time to record it before Fisher sold the property to the plaintiff, there was no laches, and the defendant was entitled to the property.

This cannot be sustained. It was the defendant's own fault that he did not retain possession of the property until his mortgage was recorded. The doctrine of due diligence and absence of laches has no application.

3. That the plaintiff was entitled to recover only the sum paid for the property, *i. e.*, $125 and interest.

The plaintiff was entitled to recover the value of the property at the time it was wrongfully taken (which the jury have assessed at $150), with interest on that amount from the taking. His Honor told the jury that in arriving at the value of the property they could take into consideration that the plaintiff had paid $125 for it, and all the other evidence as to value, and find what it was worth at the time of the taking. The defendant testified that it had cost him $212.

No Error.

F. B. ULLERY ET AL. v. WILLIAM A. GUTHRIE.

(Filed 14 October, 1908.)

1. **Appeal and Error—Assignment of Error of Record—Appeal from Judgment.**

When the appeal calls in question only the correctness of the judgment no summary of exceptions under Rule 19 (2) is required by Rule 21, because it is error on the face of the record. Otherwise a demurrer is sustained or overruled, for Revisal, sec. 475, provides that the demurrer shall distinctly specify the grounds of objection to the complaint.

2. **State's Land—Entry—Same Lands—Dispute as to County—Procedure.**

When the defendant, under Revisal, sec. 1905, is claiming to lay an entry, and asks a grant for land admitted to be the same as contained in plaintiff's grant, the plaintiffs entering their

protest that the land lay in a certain county, and the defendant contending that the protest should be dismissed for that it lay in a different county, relief can be had in the pending cause, and it is not necessary to resort to an action of ejectment after defendant has perfected his grant.

ACTION heard by *Neal, J.*, at May Term, 1908, of NEW HANOVER.

Plaintiffs appealed.

C. Ed. Taylor for plaintiffs.
Guthrie & Guthrie for defendant.

CLARK, C. J. Rule 21 of this Court provides: "A case will not be heard until there shall be put in the record, as required in Rule 19 (2), the summary of exceptions taken on the trial and those taken in ten days thereafter to the charge. Those not thus set out will be deemed to be abandoned." Rule 20 prescribes the action which the Court may take if this is not done.

This is a reasonable and just rule, which obtains doubtless in all appellate courts, and is the result of experience which has shown the benefit of thus indicating at a glance to opposing counsel, and the Court as well, the propositions of law which will be debated. It imposes no burden on the appellant thus to sift out of the numerous exceptions, taken out of abundant caution on the trial, those which he will rely upon and discuss upon appeal. We can add nothing to what has been said by this Court in *Lee v. Baird*, 146 N. C., 362. It is indispensable in all courts that there should be some rules of practice, else there will be hopeless disorder and confusion. It is, for the same reason, not so important what the rules are as that the rules, whatever they may be, shall be impartially applied to all, and that changes shall be prospective by amendment to the rules, and not retroactive by granting exemption to some which has been denied to others.

It has always been held that an appeal is itself a sufficient exception and assignment of error to the judgment, for that is

a matter appearing upon the face of the record proper, and as to errors on the face of the record no exception is required. Revisal, sec. 1542. This is fully discussed in *Thornton v. Brady,* 100 N. C., 38, which has been repeatedly cited since. But if an exception and assignment of error to the judgment were necessary, the appeal itself is a sharp assignment that the facts found or admitted do not justify the judgment. *Appomattox Company v. Buffalo,* 121 N. C., 37; *Murray v. Southerland,* 125 N. C., 176; *Delozier v. Bird,* 123 N. C., 692; *Cummings v. Hoffman,* 113 N. C., 269. Of course, if the appeal is an exception to the judgment, it is on the ground that the facts found or admitted do not justify the judgment. And when there are no other exceptions in the case this one exception cannot be grouped.

It has been urged that if an appeal is itself an exception to the judgment, and when it is the only exception it cannot be grouped, that, therefore, when a demurrer is sustained or overruled the appeal from such judgment is a sufficient assignment. It would be but for the fact that Revisal, sec. 475, provides: "The demurrer shall distinctly specify the grounds of objection to the complaint. *Unless it does so, it shall be disregarded.*" Therefore, on appeal from a judgment on a demurrer, the assignment of error should specify which of the grounds set out in the demurrer will be relied upon on appeal. If only one, that should be specified, else the demurrer is general and therefore "to be disregarded." Revisal, sec. 475. A demurrer cannot state generally that a complaint is invalid, but must specify wherein. When the demurrer is on the ground that the complaint does not state a cause of action or that the court does not have jurisdiction, it may be taken *ore tenus,* and Rule 27 provides that such exceptions can be taken for even the first time in this Court, and, indeed, if not assigned, the Court should take notice of it *ex mero motu.*

An appeal is of itself an exception to and assignment of error in the judgment, and when there is (as in this case)

no other assignment of error, it is incapable of being grouped, and the motion to dismiss for noncompliance with Rule 21 must be denied.

The defendant made an entry of "Battery Island," which he claims is in New Hanover. The plaintiffs entered their protest, on the ground that they held the grant for said "Battery Island" as lying in Brunswick County. It is not controverted that the protestants hold such grant, and that it is valid if "Battery Island" lies in Brunswick. Nor is it controverted that "Battery Island," entered by the defendant, is the same *locus in quo* for which the protestants hold a grant.

The defendant contends that the protest should be dismissed because, though it is the same *locus in quo*, his entry describes it as being in New Hanover, and that he should be allowed to go on and take out his grant, leaving the question whether the island lies in New Hanover or Brunswick to be tested in another action. The protestants contend that, the *locus in quo* being the same "Battery Island," and Revisal, sec. 1709, providing "if any person shall claim title to, or an interest in land covered by the entry, etc.," the plaintiffs can file protest and proceed, as they have done.

If it be conceded, as the defendant contends, that the validity of his entry and of protestants' grant depends upon whether "Battery Island" lies in New Hanover or Brunswick, we can conceive of no reason why that fact cannot be determined upon an issue submitted to the jury in this case fully as well as it could be if the defendant were permitted to go on to perfect his grant and test the question in an action of ejectment. The law does not love multiplicity of suits or circuity of action, but will give relief when it can be done without prejudice in a pending action. It is true, as defendant contends, that if the island does not lie in New Hanover the grant he seeks will be void, but there is no reason why that question should not be determined in this proceeding.

We are not inadvertent that the plaintiffs contend that, by virtue of Revisal, sec. 737, "not knowing the county line," even if they hold under a grant describing the land as lying in Brunswick, when in truth it lies in New Hanover, their grant is good and valid. The defendant relies upon *Harris v. Norman,* 96 N. C., 62. But that point was not passed on and, indeed, cannot arise unless and until it is found as a fact that "Battery Island" lies in New Hanover. For all that now appears, it may lie in Brunswick. The defendant, in the language of Revisal, sec. 1709, is claiming to lay an entry and is asking a grant for the identical land named and described in the grant held by the plaintiffs. The protest having been dismissed on the ground that the complaint did not state a cause of action, that is the only point presented, and that ruling is

Reversed.

ACME PAPER BOX FACTORY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 October, 1908.)

1. Carriers of Goods—Consignor and Consignee—Contract to Deliver—Suit by Consignor.

   A vendor who is under contract to deliver goods to a vendee is entitled to recover the identical goods or, if they are lost, their value and interest from a common carrier in default, to whom they had been delivered for shipment.

2. Same—Evidence—Nonsuit.

   It is error in the trial Judge to render a judgment of nonsuit upon the evidence in an action brought by a consignor against a common carrier to recover the value of a lost shipment, when there is evidence that he was under contract to deliver it to the consignor at destination. In such instances the title and possession of the shipment do not, as a matter of law, pass to the consignee by delivery to the common carrier.

ACTION tried before *Neal, J.,* and a jury, at May Term, 1908, of LENOIR.

This action was to recover the value of a shipment of boxes, made by plaintiff to the Hamlin Tobacco Company, the consignee. At the close of the evidence the defendant moved to nonsuit; motion allowed. Plaintiff excepted. From the judgment rendered the plaintiff appealed.

Wooten & Wooten for plaintiff.
Rouse & Land for defendant.

BROWN, J. The ruling of the court below was evidently based upon the general doctrine that when the vendor delivers the goods to the carrier, consigned to the vendee, both title and possession pass from the vendor and vest in the vendee, the common carrier becoming the agent of the vendee, and the vendor has no further *interest in or control over* the goods thus shipped, in the absence of an agreement of the parties varying this rule or in case of stoppage *in transitu*, where its principles apply. In this case there is some evidence which takes it out of that general rule and which tends to prove that the plaintiff contracted to deliver the goods to the consignee, the Hamlin company. If that be true, the title remained in the plaintiff until actual delivery to consignee, and plaintiff could not only stop the goods, but could recover their value from any person who converted them while in transit. There is some evidence tending to prove that the goods were received by defendant and retained in its warehouse without notice to consignee. The plaintiff Lindsey testifies that the goods were to be delivered by the plaintiff, and that he was the owner of the goods.

If these facts be true, the plaintiff would be entitled to recover the identical goods from defendant and, if it has converted them or they are lost, their value, and interest. *Davis v. Railroad*, 60 S. E. Rep., 722; *Summers v. Railroad*, 138 N. C., 295; *Cardwell v. Railroad*, 146 N. C., 219.

If the transaction was an ordinary sale on sixty days' credit, and the contract of the plaintiff was to deliver them "free on

board"—that is, to the carrier at the initial point of shipment—then plaintiff could not recover.

We think his Honor should have submitted the issue to the jury, with appropriate instructions.

New Trial.

MELVILLE DORSEY v. TOWN OF HENDERSON.

(Filed 14 October, 1908.)

1. **Cities and Towns—Grading Streets—Damage to Abutting Owner—Liability of City.**

Revisal, sec. 2930, provides that the commissioners shall keep the streets, etc., of a town in repair, "in such manner and to the extent they deem best, and cause such improvements in the town to be made as may be necessary." Therefore, when the commissioners of a town, in the exercise of these powers, cause in their discretion grading of the streets or sidewalks to be made, whereby the value of plaintiff's property has been decreased, the plaintiff cannot recover of the town therefor, in the absence of statutory provision for compensation, if the commissioners have acted with due care and skill.

2. **Same—Change of Plan—Ratification.**

When the street commissioners of a town changed the original plans of its civil engineer in regard to grading the streets and sidewalks, and damages are claimed by a property owner on that account, the courts are precluded from inquiring into the advisability of the change, when it appears that the town commissioners have adopted and approved it.

ACTION tried before *Cooke, J.*, and a jury, at May Term, 1908, of VANCE, to recover damages of the defendant for alleged injury to the plaintiff's property, consisting of a building used for stores, situated on Garnett Street, in said town, caused by the grading and lowering of the sidewalk and street in front of the same.

The following issues were submitted to the jury:

1. "Did defendant, in grading and constructing the sidewalk in front of plaintiff's store, grade and construct the same in a negligent, unlawful, wanton or improper manner?" Answer: "Yes."

2. "If yes, what damage is plaintiff entitled to recover?" Answer: "Fifteen hundred dollars."

At the close of the evidence the defendant moved to nonsuit the plaintiff upon the grounds (1) that the defendant had the lawful authority to grade the sidewalk and street in front of plaintiff's property; (2) that there was no evidence that the work was done in a negligent, wanton or improper manner.

The court overruled the motion, and defendant excepted and appealed.

F. S. Spruill, A. J. Harris, Bennett Perry and *J. C. Kittrell* for plaintiff.

T. T. Hicks, A. C. Zollicoffer and *T. M. Pittman* for defendant.

BROWN, J. The evidence tends to prove that the plaintiff, during the year 1885, erected on Garnett Street, in the town of Henderson, a two-story brick building abutting on the sidewalk. At that time Garnett Street had been opened and, with the sidewalk, was in use by the public. In 1903 the municipal authorities, for the benefit and improvement of the town, inaugurated a scheme for the paving and improvement of the streets and the construction of a sewerage system. They employed a competent engineer, who, with his assistant engineer, drew up and submitted the plans and specifications of the work.

The plans, as originally submitted by the principal engineer, Mr. Ludlow, did not contemplate lowering the grade in front of plaintiff's store, but to obviate the necessity for it by means of a deep curb and a step.

Upon further investigation, consideration and advice, the town authorities decided to grade the sidewalk on Garnett Street on a level incline with the curbing and do away with the step, etc., as originally called for in the Ludlow plans. This necessitated lowering the grade some sixteen inches,

according to plaintiff's evidence, at the door of his store, so as to require the construction of steps from the sidewalk to the door sill, which injures the value of his building as a place of business. The question presented on this appeal, and argued with much learning and ability by counsel on both sides, is the right of a person owning a building abutting on a public street to recover damages for the diminution in the value of his property, caused by the change in the grade of the street, in the absence of any negligence in the construction of the work.

The learned counsel for the plaintiff, Mr. Spruill, in his argument, as well as in the brief, admitted that this question has been "apparently decided" by this Court adversely to the contention of the plaintiff.

The law has been so held by this Court in a number of cases, and in such explicit terms that to adopt the plaintiff's theories would be to overrule a long line of well-established precedents. The question was first considered by this Court in 1848 and exhaustively discussed by *Judge Pearson,* and the conclusion reached that where a municipal corporation has authority to grade its streets it is not liable for consequential damage, unless the work was done in an unskillful and incautious manner. *Meares v. Wilmington,* 31 N. C., 73. This case has been approved and followed in many adjudications of this Court in more recent years. *Salisbury v. Railroad,* 91 N. C., 490; *Wright v. Wilmington,* 92 N. C., 160; *Tate v. Greensboro,* 114 N. C., 397; *Brown v. Electric Company,* 138 N. C., 537; *Jones v. Henderson,* 60 S. E. Rep., 894; *Ward v. Commissioners,* 146 N. C., 538; *Small v. Edenton,* 146 N. C., 527. In *Thomason v. Railroad* the subject is referred to as "the settled doctrine of this State." 142 N. C., 307.

The adjudications of this Court are supported by abundant authority elsewhere. Judge Dillon says: "Authority to establish grades for streets, and to grade them, involves the right

to make changes in the surface of the ground which may injuriously affect the adjacent property owners; but where the power is not exceeded there is no liability, unless created by special constitutional provision or by statute (and then only in the mode and to the extent provided), for the consequences resulting from the powers being exercised and properly carried into execution." 2 Dillon on Mun. Corp., sec. 1040.

The law is summarized in the Encyclopædia as follows: "A change of grade in streets made by a municipality, if made in accordance with statute, is not such an injury to adjoining property as to require compensation to be made to owners, unless there is a statute rendering the municipality liable therefor." 10 Am. and Eng. Enc. of Law (2d Ed.), p. 1124ff, citing cases from England, Supreme Court of the United States and twenty-five States. The same rule of law is recognized and asserted by the Supreme Court of the United States in *Transp. Co. v. Chicago,* 99 U. S., 635; *Smith v. Corp. of Washington*, 20 Howard, 135. The principle upon which such adjudications rest is that in making the improvements the municipality is the agent of the State, and that these agencies authorized by law to make or improve public highways are not answerable for consequential damages, if they act within their jurisdiction and with due care and skill.

The doctrine is almost universally accepted by the State courts of this country. Cooley on Const. Lim., p. 542, and notes.

The decisions in Ohio, so far as we can ascertain, appear to be the solitary exception.

It is the settled doctrine of the English courts since the days of Kenyon and Buller. *Governor and Company of the British Cast Plate Manufacturers v. Meredith*, 4 Durn. and East Term Rep., 794-796; *Sutton v. Clark*, 6 Taun., 28; *Boulton v. Crowther,* 2 Barn. and Cres., 703.

The Supreme Court of the United States, in the above-cited case, refers to this well-settled rule of law in these terms: "The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it did not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Charta*, and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority."

It is contended, however, by the plaintiff that the defendant is liable because the street committee changed the Ludlow plan, which contemplated a step, so as to avoid lowering the grade at plaintiff's store, and, instead of the step in the sidewalk, altered the grade, when such alteration was unnecessary. The record shows that the municipal authorities fully authorized and ratified the act of the committee, and consequently such act become the act of the municipality itself. Ratifica-

tion is equivalent to previous authority. As said by *Mr. Justice MacRae* in a strong opinion in *Wolf v. Pearson, supra,* "The city had the right to grade the street, and by its subsequent assent it has in effect commanded the act complained of to be done"; and again, "This doctrine of ratification will in some instances apply to torts as well as contracts" (p. 631).

Into the advisability of this change the courts are precluded from inquiring. The public use is the dominant interest, and of this the municipal authorities are the exclusive judges.

As is well said by the Chief Justice in *Small v. Edenton, supra,* p. 527: "If every ordinance were subject for approval upon the verdict of juries, it would be impossible to regulate the streets and sidewalks so as to secure conformity, convenience, protection from fire, proportion and sightliness and other necessary things incident to the growth and development of modern municipalities. These views are distinctly declared in *Tate v. Greensboro.* That authority has often been cited, and we adhere to it."

But we will say in this connection that the advisability of the change finds support in the testimony of both the civil engineers, Ludlow and White. There is no evidence whatever that the change was induced by any hostility to plaintiff or by a wanton purpose to injure him. Nor is there any evidence that the work was negligently or unskillfully done.

The legislative authority to change the grade is ample: "Said commissioners shall have the exclusive power to open, alter or change the streets, alleys and ways of said town, and also their grade." Charter of Henderson, Laws 1889, ch. 241, sec. 62. "The board of commissioners shall provide for keeping in repair the streets and bridges of the town, in such manner and to the extent they may deem best, and may cause such improvements in the town to be made as may be necessary." Revisal, sec. 2930.

There is no constitutional or statutory provision allowing compensation in this class of cases, and in the absence of such we must hold that the injury to the plaintiff is *damnum absque injuria.*

The motion to nonsuit is allowed.

Error.

EDWARDS BROS. v. EDWIN ERWIN AND J. M. PIPER.*

(Filed 14 October, 1908.)

1. **Evidence—Telegrams.**

When telegrams are introduced in evidence from one party to the suit to the other, telegrams from the other party, received under circumstances clearly indicating they are replies, can be introduced by the same party without further proof, when they are relevant to the inquiry.

2. **Same—Harmless Error.**

When of a series of telegrams one is admitted in evidence as received in reply to those sent by the party offering them, and it does not appear to have any connection with the others and has no bearing upon the facts at issue, it is harmless error.

3. **Judgment—Evidence—Nonsuit—Substantial Damages—Instructions.**

When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from a breach of contract, a motion as of nonsuit upon the evidence will not be sustained upon the theory that no substantial damages have been shown. The question as to a substantial recovery must be raised by a prayer for instruction.

4. **Judgments—Evidence—Nonsuit—Collateral Matters.**

A motion as of nonsuit upon the evidence should not be directed to collateral matters, and thereunder the defendant cannot successfully contend that plaintiff obtained a warrant of attachment, alleging a breach of contract, and then complained and laid his proof in tort.

ACTION tried before *Lyon, J.,* and a jury, at Fall Term, 1908, of WILSON.

*CONNOR, J., did not sit on the hearing of this case.

This is an action brought by the plaintiffs to recover damages of the defendants. The plaintiffs alleged, and introduced evidence to prove, that in November, 1902, they purchased of the defendants a car load of horses and mules at the stock yard of the defendants in Fort Scott, Kansas, and gave in payment their sight draft for the amount of the purchase price on S. A. Woodard, of Wilson. This draft was accepted by the defendants in payment for the said stock, and the stock was thereupon shipped from Fort Scott to Wilson *via* Atlanta, Georgia. The plaintiffs had been dealing with the defendants for several years and had purchased from them several car loads of stock, giving in payment therefor sight drafts on S. A. Woodard. These drafts had always been paid on presentation. S. A. Woodard was solvent. The usual time taken for such shipments from Fort Scott to Wilson was about seven days. The horses and mules were detained in Atlanta, by the unlawful action of the defendants, for six days. When they arrived in Wilson they were in bad condition, had a disease known as pink eyes, were bruised and had coughs and colds. The plaintiffs alleged that they were damaged in a large sum by reason of their detention.

The defense of the defendants was that the stock was purchased from a corporation of which the defendants were members, and if the plaintiffs had any cause of action on account of the detention of the stock it was against the corporation and not against the defendants as individuals.

The evidence of the plaintiffs tended to show that they purchased the stock from the defendants as partners and not as a corporation. The jury, in response to the issues, found the facts to be that the plaintiffs purchased the stock of the defendants as members of a firm doing business under the name of Erwin-Piper Horse and Mule Company and not as a corporation; that the defendants unlawfully and without cause ordered the car load of stock to be stopped at Atlanta; that the stock was damaged by reason of being stopped, and

that the plaintiffs sustained the damage assessed by reason of the stopping of the live stock in Atlanta.

For the purpose of establishing the fact that the stock was unlawfully and wrongfully stopped by the defendants, the plaintiffs offered in evidence three telegrams from the defendants. The telegrams were admitted in evidence, and the defendants excepted.

The testimony tended to establish the fact that the second and third telegrams were sent in response to telegrams of the plaintiffs to the defendants, at Fort Scott, Kansas, and to Edwin Erwin, one of the defendants, at Atlanta, Georgia.

At the close of the testimony the defendants moved to nonsuit the plaintiffs. The motion was overruled and the defendants excepted. There was a verdict for the plaintiffs. A motion for a new trial by the defendants was overruled and judgment entered on the verdict. Defendants excepted and appealed.

F. A. Woodard for plaintiffs.
Connor & Connor for defendants.

WALKER, J., after stating the case: The defendants objected to the introduction of the telegrams, upon the ground that there was no evidence they had been sent to them by the plaintiffs. The last two telegrams purported to be in reply to telegrams sent by the plaintiffs to the defendants, and were received at a time and under such circumstances as clearly to indicate that they were so sent. They tended to show that the defendants had stopped the horses and mules, *in transitu,* at Atlanta. The authorities sustain the ruling of the court by which the telegrams were admitted. "A further exception to the rule requiring proof of handwriting has been admitted in the case of letters received in reply to others proved to have been sent to the party. Thus, where the plaintiff's attorney wrote a letter, addressed to the defendant at his residence, and sent it by the post, to which he received a

reply purporting to be from the defendant, it was held that the letter thus received was admissible in evidence, without proof of the defendant's handwriting, and that letters of an earlier date in the same handwriting might also be read, without other proof." 1 Greenleaf on Evidence (16th Ed.), sec. 575c. The principle thus stated has been extended to telegrams. *Taylor v. Steamer Robert Campbell,* 20 Mo., 254. "The courts have likened telegrams to letters, and held that purported answers are admissible as *prima facie* evidence. It is well settled that when a letter is received, in due course of mail, purporting to be in response to a letter previously sent by the receiver, it is presumptively genuine and admissible. The principle upon which these cases rest is that there is a presumption that those in charge of receiving and transmitting mail perform the duties entrusted to them, and this, coupled with the facts that the letter received, on its face, purports to be a reply to the one sent, and comes from the source from which it might be expected, raises a just inference that it is in fact a reply. We see no good reason why this same presumption of the performance of duty should not obtain as to the employees of a telegraph company. A large portion of the business of the country is transacted through the medium of such agencies, and, while it is true that mistakes sometimes occur, it is also true that the postal service is not infallible. It was held in *Com. v. Jeffries,* 7 Allen, 556, that there is a presumption that when a telegram has been delivered to the telegraph company and accepted by the operator for transmission it is duly forwarded and received by the addressee. "If the presumption obtains, what is to be inferred from the receipt of an answer to such a communication? Is it any less strong than the receipt of an answer by mail to a letter? We think it is no stretch to say that a presumption arises that such answer was in either case sent by the original addressee," citing *Armstrong v. Thresher Co.,* 5 S. D., 12; *Bank v. Geishardt,*

55 Neb., 232; *Melby v. Osborne*, 33 Minn., 492; 1 Greenleaf Ev., sec. 573a; 3 Wharton Ev., sec. 1328. The court admitted the last two telegrams. As to the first telegram, when considered in connection with the other two, it appears to be but a part of one and the same correspondence. But if this circumstance be not sufficient to let it in, its contents are not of such a character as to warrant the granting of a new trial. It merely states what the defendants might do in a given contingency, and if it was incompetent the error in admitting it was harmless. The other messages showed that the horses and mules had been stopped at Atlanta, and the last one was sent from that place by one of the defendants.

The defendants moved to nonsuit the plaintiffs at the close of the testimony because of the absence of evidence to show that the damage to the horses and mules was caused by the defendants' act in stopping them at Atlanta. If the defendants committed a wrong to the plaintiffs by stopping the horses and mules at Atlanta, the plaintiffs were entitled, at least, to nominal damages. *Chaffin v. Manufacturing Co.*, 135 N. C., 95. The *quantum* of damages, beyond those which are nominal, must be determined by the jury, under proper instructions from the court, and is not involved in a motion to nonsuit. The latter motion is addressed always to the evidence of the cause of action, which is complete when the plaintiff has alleged and shown facts upon which he is entitled to nominal damages. Any question as to the right of the plaintiffs to recover substantial damages must be raised by a prayer for instructions.

The defendants also contended that the plaintiffs, in their affidavit for an attachment, had alleged a breach of contract, and by the testimony had shown a tort. If there is any such variance, advantage cannot be taken of it by a motion to nonsuit. It was a proper subject, perhaps, for a special instruction to the jury upon an issue framed with a view to

ascertain the legal character of the particular wrong, so that the court, upon the finding of the jury, could render judgment accordingly. It is, though, enough to say that the question cannot be raised by a motion to nonsuit, which, as we have already stated, is directed to the proof of the cause of action and not to collateral matters, such as ancillary proceedings, or to the question as to the amount of the damages to which the plaintiff may be entitled.

No Error.

J. G. STATON v. J. G. GODARD.

(Filed 14 October, 1908.)

Wills, Interpretation of—Remainders—Vested Interests—Child, etc., Living.

Property was devised to a daughter, but "should she die without child," etc., then to J., L. and E. for life, and then over. J. and the daughter intermarried and had children, who did not survive their mother. At the death of the mother: *Held*, that J. could not take a fee simple, as no interest vested in the children; this, both by interpretation of the language of the will itself and the rule in Revisal, sec. 1581, providing that, unless it is otherwise clearly expressed in the will, the children, etc., must be alive at the death of the first taker for the interest to vest in them.

CONTROVERSY submitted without action, heard before *Lyon, J.*, at June Term, 1908, of MARTIN.

Defendant appealed.

H. W. Stubbs for plaintiff.

No counsel *contra*.

CLARK, C. J. The sole question is the construction of the following clause in the will of Louisa Yates: "I lend and bequeath to my granddaughter, Mary Louallie Poole, during her natural life, and then to her child or children and issues,

if any, but if she should die without child or children or issue, then this property to belong to James Grist Staton, Louisa Staton and Ella Staton during their natural lives and then to their child or children and issues thereof, the following real and personal property" (describing it).

Upon the facts agreed it appears that Mary Louallie Poole married the plaintiff, James Grist Staton; that there were born to said marriage three children, who died previous to their mother, and without issue, and the mother is since dead. The plaintiff insists that the children took a vested remainder, that upon their death such vested remainder passed to him, and he is entitled to the whole.

Such is not the language of the will. It provides that if Mary Louallie "should die without child or children or issues, then this property to belong to James Grist Staton, Louisa Staton and Ella Staton during their natural lives," and then over. And this was exactly what happened. The first life tenant died without leaving any child or children or issue. The devise to them was contingent upon their being alive at the death of the life tenant, and was never vested in them. At her death the property passed to James Grist Staton and his two sisters as life tenants, and then over. The intent of the will to this effect is clear. If it had been doubtful, chapter 7, Laws 1827 (now Revisal, 1581), provides, as the rule of construction, that a devise to one for life, with remainder over upon his dying "without heirs" or "without issue" or "without children," shall be construed to mean dying without heirs or children or issue "living at the time of his death" (or born to him within ten lunar months thereafter), unless a contrary intent is "expressly and plainly declared in the face of the deed or will."

The ruling of the court below that James Grist Staton, upon the death of his wife, took a fee simple is

Reversed.

C. H. FOY v. JAMES O. GRAY ET AL.

(Filed 14 October, 1908.)

1. Appeal and Error—Docketing Transcripts—Motion to Dismiss—Laches of Movant.

When, under Rule 5 of the Supreme Court, the appellant does not docket his appeal "seven days before the call of the district to which it belongs," and the appellee defers making the motion to dismiss until the call of the district has begun, and the transcript on appeal has then been docketed, the appellee has been guilty of laches, and his motion to dismiss will be denied.

2. Appeal and Error—Referee's Findings of Fact—Evidence.

The Supreme Court is bound by the findings of fact of the referee, sustained by the trial Judge, when there is evidence to support them.

ACTION heard on exceptions to report of referee, by *W. R. Allen, J.*, at chambers, 27 July, 1908, from CRAVEN.

Plaintiff appealed.

G. V. Cowper and *Rouse & Land* for plaintiff.

P. M. Pearsall for defendants.

CLARK, C. J. The plaintiff did not docket his appeal "seven days before the call of the cases of the district to which it belongs." Rule 5. If the appellee had moved to dismiss at that time or at any later day prior to the actual docketing of the transcript on appeal, the motion must have been allowed. Rule 17. But the appellee deferred making the motion till the call of the district had begun, and before that time the appeal had been docketed. The appellee was thus himself guilty of laches, and his motion to dismiss is denied. *Craddock v. Barnes*, 140 N. C., 428; *Curtis v. Railroad*, 137 N. C., 308.

The account between the parties was heard upon a reference by consent. Both sides excepted to the referee's findings, and on appeal the Judge overruled all exceptions and confirmed the report. When the Judge sustains the findings of fact by the referee his ruling is conclusive, except as to those

findings of fact as to which there is no evidence to support them, and that ground is set out in the exception. *Dunavant v. Railroad,* 122 N. C., 999; *Collins v. Young,* 118 N. C., 265. There are only two exceptions of that nature, *i. e.,* to the seventeenth and twenty-seventh findings of fact, and as to them we find the exceptions not well taken.

The appellant insists that we "review all the evidence and findings" in this case. But we are bound by the referee's findings of fact, when approved by the Judge (if there is any evidence on the finding excepted to), fully as much as we are by the finding on an issue by a jury.

We find no error in the rulings as to the law.

Affirmed.

J. C. ANDREWS AND RUFUS BOWEN v. T. C. GRIMES ET AL.

(Filed 14 October, 1908.)

1. **Claim and Delivery—Ownership—Evidence—Issues.**

An allegation and supporting evidence that certain tobacco, the subject of claim and delivery proceedings, was in a house on defendants' land at the time of the alleged sale, and by agreement was to be hauled and delivered to plaintiffs by defendants, is sufficient to raise the issue, "Did defendants afterwards agree with plaintiffs that the tobacco should remain on defendants' land as the property of the plaintiffs?"

2. **Pleadings—Slight Variations Disregarded—Amendments in Superior and Supreme Courts.**

Very slight variations between the allegation and the proof should be disregarded; and, when the variation is serious, amendment may be permitted by the trial Judge to make the allegations conform to the proof (Revisal, sec. 507), and also by the Supreme Court. (Revisal, sec. 1545.)

3. **Claim and Delivery—Evidence of Ownership—Policy—Collateral Matters.**

As evidence of ownership of a lot of tobacco in dispute, it was competent to show by parol evidence that it had been insured by plaintiffs as their own, without putting the policy itself in evidence, as it was collateral to the issue.

ANDREWS *v.* GRIMES.

ACTION tried before *W. R. Allen, J.*, and a jury, at April Term, 1908, of PITT.

Defendants appealed.

J. I. Fleming for plaintiffs.
Jarvis & Blow and *Julius Brown* for defendants.

CLARK, C. J. Action with claim and delivery for 4,000 pounds of tobacco, a portion of a larger quantity which the plaintiffs claimed they had bought of the defendants. The jury found, in response to the issues submitted, that it was agreed between the parties that the price of said tobacco should be 6¾ cents per pound; that the defendants were to finish the grading and were to haul the tobacco to Robersonville, where it was to be weighed and the price paid; that the parties afterwards agreed that the tobacco should remain in a house on the land of the defendants as the property of the plaintiffs; that no part of the purchase money has been paid; that the tobacco, when seized in this action, was worth $340, *i. e.*, 4,000 pounds at 8½ cents; whereupon the court gave judgment for $70, the difference between 6¾ and 8½ cents on 4,000 pounds.

The exception to the submission of the third issue, "Did defendants afterwards agree with the plaintiffs that said tobacco should remain on the land of the defendants as the property of the plaintiffs?" cannot be sustained. There was allegation in the complaint that the tobacco at the time of the alleged sale was delivered to the plaintiffs; that it was in a house on the lands of defendants and was to be hauled by them to plaintiffs' warehouse as rapidly as it could be prepared. This justified the issue. There was evidence to support this view, and the court, after verdict, even, could have permitted the complaint, if necessary, to be amended to conform "to the fact proved" (Revisal, sec. 507), and this Court can do the same. Revisal, sec. 1545. But, in

fact, if there was any variance between allegation and proof, it was so slight that it should be disregarded. Revisal, sec. 515.

Evidence that the plaintiffs at once insured the tobacco was competent, especially in view of their evidence that it was agreed at the time that the tobacco was the plaintiffs', and if burnt, that it would be plaintiffs' loss. And it was competent to prove the fact of insurance, without putting the policy in evidence. This was not a suit on the policy and its terms were not material. It was collateral to the issues. *Ledford v. Emerson,* 138 N. C., 503, and cases cited.

Upon the issues found by the jury, the title and right to possession passed under the agreement. Though the purchase money was not paid at the time, nor to be paid until delivery of the tobacco, it was agreed that the tobacco was to remain on defendants' premises as the property of the plaintiffs. Nor did the fact that the defendants were to prepare the tobacco and haul it in anywise derogate from the completion of the sale and transfer of the title, if the agreement was as found by the jury.

No Error.

SARAH A. HARGROVE ET AL. V. JOHN E. WILSON.

(Filed 14 October, 1908.)

Lands—Partition—Judgments—Collateral Attack—Fraud or Mistake—Statutory Remedy.

When land is sold and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form, and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked, as the remedy is by petition in the cause, under Revisal, sec. 2513.

ACTION heard before *W. R. Allen, J.,* and a jury, at December (Special) Term, 1907, of SAMPSON, to vacate and

set aside a proceeding for partition and the decree therein rendered by the Clerk of the Superior Court of Sampson County.

Defendant appealed.

George E. Bulter and *F. R. Cooper* for plaintiffs.
H. A. Grady and *Faison & Wright* for defendant.

BROWN, J. The record discloses that on 24 September, 1901, an *ex parte* proceeding for partition was commenced before the Clerk in the name and behalf of John E. Wilson, the defendant in this case, and of Sarah A. Hargrove and the other plaintiffs in this action, for the sale for partition of the land described in the complaint. The petition is signed by certain attorneys as "solicitors for petitioners," and is verified by the oath of J. E. Wilson. On the same day a decree of sale was made by the Clerk, and a commissioner was appointed with authority to sell the land at either public auction or private sale. At the public sale the defendant, John E. Wilson, became the purchaser for the price of $500 and the sale was confirmed in May, 1902, by the Clerk, whose order was approved by a Judge of the Superior Court.

This action is brought to set aside the decree and sale of the land, upon the ground that plaintiffs were not made parties to the proceedings, with their knowledge and consent.

When the case was called for trial the defendant moved to dismiss the action, upon the ground that the record in the partition was regular in form and that it appeared on its face that the plaintiffs were parties to it and that it could not be attacked collaterally in this action. The motion was overruled and the defendant excepted.

It is elementary learning that a decree of a court having jurisdiction in a proceeding, in all respects regular on its face as to parties, cannot be attacked collaterally. It may be successfully impeached for fraud in an independent action brought for the purpose, when sufficient allegations of

fraud are made and issues framed upon such allegations are submitted to a jury and the fraud is established by the verdict. *Tate v. Mott,* 96 N. C., 19; *Morris v. White,* 96 N. C., 93; *Carter v. Rountree,* 109 N. C., 29; *Rackley v. Roberts,* 147 N. C., 201; *Simmons v. Box Co., ante.*

In this case there are no sufficient allegations of fraud set out in the complaint, and no issue of fraud was tendered by the plaintiff or submitted to the jury by the court. The gravamen of plaintiffs' complaint is that John E. Wilson, the defendant, and his attorneys instituted the partition proceedings of their own motion, without the knowledge, consent or authority of these plaintiffs, and that, while these plaintiffs appear on the record as parties to it, as a matter of fact they were not parties. A person who has never been made a party to a judicial proceeding cannot bring an independent action to set it aside on the ground of fraud. He has no reason whatever to invoke the equitable power of the court for any such purpose, in that he has not been injured. He has an adequate remedy at law by proceeding in the cause to which he is apparently a party, and moving therein to set aside the judgments and decrees, so far as they affect him, and to correct the record so as to show in fact that he was not a party. *Carter v. Rountree, supra.*

The partition proceeding under which the land was sold appears to be in all respects regular, and these plaintiffs appear on its face to be parties to it; therefore they are apparently bound by it. If it should be established as a fact that they were made parties without their knowledge or consent, and have not ratified and assented to the proceedings and decree, then they may be set aside by motion in the cause. *Burgess v. Kirby,* 94 N. C., 575.

We have discussed only the general law, applicable to all judicial proceedings alike, in its reference to this case. But as to proceedings in partition especially the General Assembly seems to have provided that they can only be attacked,

set aside or impeached for fraud or mistake, or upon any other ground, by "petition in the cause." Revisal, sec. 2513, after prescribing the machinery by which sales of land may be made in special proceedings, further provides "that any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion *by petition in the cause.*" Here is a full, complete and adequate remedy provided by law, under which the plaintiffs can seek relief, even for fraud or mistake or on other ground.

His Honor should have sustained the motion.

Action Dismissed.

R. J. SOUTHERLAND v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 October, 1908.)

Judgment—Res Adjudicata—Evidence.

A judgment of a court of competent jurisdiction, including an adjudication of a fact controverted in a subsequent action, is perfect evidence of its own validity, and the fact so determined is *res adjudicata*. Therefore, when judgment has been rendered for damages for the loss of freight in an action against a carrier, the carrier cannot, in a subsequent suit brought to recover a statutory penalty for delay in settlement for the lost freight, introduce evidence tending to show that it had never in fact received the goods, as that issue was necessarily covered by the former judgment.

ACTION heard by *Guion, J.*, upon facts agreed, at June Term, 1908, of WAYNE, brought to recover of the defendant a penalty of $50 for failure to settle a claim within sixty days, under Revisal, sec. 2634.

The facts agreed are as follows: A package of freight shipped from a station of the Southern Railway, within the State of North Carolina, to Mount Olive, in said State, which is situate on the Atlantic Coast Line Railroad, was lost. Claim therefor was filed with the agent of the Atlantic Coast

Line Railroad Company at Mount Olive, and was not paid within the sixty days prescribed by the statute (section 2634 of the Revisal).

An action was brought in due time for the recovery of the value of the property against the Atlantic Coast Line Railroad Company, and judgment was rendered against said company for the value of the property, it being the exact amount of the claim filed therefor, which judgment was paid by the said railroad company. At the time of the rendition of the judgment, and at the time of the payment of the same, the defendant did not know where the loss of the property occurred, but did not inform the plaintiff that it had no such knowledge prior to the bringing of this action. Within one year from the filing of said claim this action was brought to recover the penalty of $50 against the defendant for failure to adjust and pay the claim within sixty days, and the following fact was admitted by counsel for plaintiff and defendant, subject to its competency as evidence, to be passed on by the court, to-wit: "Said freight was lost on the Southern Railway and never came into the possession of the Atlantic Coast Line Railroad Company."

The court, being of the opinion that the evidence was incompetent, refused to consider the same, and defendant excepted. Thereupon the court, upon the facts agreed, rendered judgment for the plaintiff, as set out in the record, and the defendant excepted and appealed.

John D. Langston for plaintiff.
George M. Rose for defendant.

WALKER, J., after stating the case: This undoubtedly is a hard case, when viewed with reference to the facts as they now seem to be, but in the decision of all causes we must be guided by well-established legal principles and not by our notions of what may be the general equity or justice of the particular case.

The defendant is sued for not adjusting and paying a claim for the loss of property while in its possession as a common carrier, under section 2634 of the Revisal. There had formerly been a suit between the parties, in which the present plaintiff alleged that the property had been lost by the defendant as a common carrier, which was found to be true, and the plaintiff recovered a judgment for the value of the property upon that finding of fact. That is precisely one of the issues involved in this case, the other being whether the defendant adjusted and paid the claim within sixty days, as required to do by the law, and as to the latter question there is no controversy. But the defendant contends that in this action for the recovery of the penalty it is necessary for the plaintiff to show that the property was in its possession as a common carrier, for transportation from the place of shipment to the place of its destination, at the time of the loss. This may readily be granted, and yet the plaintiff is entitled to recover. Whether the property was thus in its possession at the time of its loss was one of the very questions directly involved in the other case, and an affirmative finding upon which was absolutely essential in law to the plaintiff's recovery in that case. The doctrine of *res adjudicata* plainly must be that the decision of a court of competent jurisdiction is and ought to be a final and conclusive settlement of the questions involved in any particular controversy as to the parties concerned therein and as to any title claimed through or under those parties; so that, if a fact has been once directly tried and determined by such court, the same parties cannot properly be again allowed to contest the same matter, either in that court or in any other, and also that a judgment on such question or fact, in legal form, is perfect evidence of its own validity. Wells on Res Adjudicata, sec. 5. In *Packet Co. v. Sickles,* 5 Wall., 592, it was held that if the record of the former trial shows the verdict could not only have been rendered without deciding

the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and, further, in cases where the record does not show that the matter was necessarily and directly involved, evidence *aliunde* consistent with the record may be received to prove what question was tried and determined. It can make no difference, in the application of the principle, that the decision of the court upon the controverted fact in the former suit was in fact erroneous. So long as the judgment in that action remains unreversed, the finding of the court is conclusive as to all matters necessarily adjudicated, and cannot be questioned in any subsequent suit between the same parties, where the identical matter is presented for decision. The rule is applicable either to an entire cause or to particular facts in issues and embraced by the former adjudication. If it can be applied to an entire action, then it is a bar in full; if to particular facts, it is conclusive as evidence, so far as it goes. Wells Res Adjudicata, pp. 3-4. See, also, *Tyler v. Capehart,* 125 N. C., 64; Bigelow on Estoppel (5th Ed.), p. 99. "It is a well-established rule of law that every material fact involved in an issue must be regarded as determined by the final judgment in the action, so as not to be a subject of trial in any subsequent proceeding between the same parties." Bigelow, p. 97. We said in *Lumber Co. v. Lumber Co.,* 140 N. C., at p. 442, that the test as to the bar of a previous decision is not whether the cause of action and relief demanded in the two actions are the same, but whether, if they are different, the decisive question is the same in both of them; and, further, that a judicial determination of the issue in the first action is conclusive in the second, although the form of the latter, the precise question presented and the relief which is sought may be different with respect to the matters tried in the former suit.

Applying this elementary principle to the case in hand, we find it was decided in the former case, to recover for the

loss of the goods, that they were lost by the defendant and not by the Southern Railway Company. The judgment could have been rendered upon no other finding of fact. This being so, the defendant cannot reopen that question in this suit and have the finding reversed, but is concluded by the former adjudication. The evidence offered by the defendant, which clearly tended to contradict the former finding, was incompetent and was properly excluded. This is the only question in the case, according to the admission in the brief of defendant's counsel.

No Error.

HOUSE COLD TIRE SETTER COMPANY v. W. E. WHITEHURST.

(Filed 14 October, 1908.)

Vendor and Vendee—Contracts—Breach of Warranty—"Opinion Evidence."

In an action to recover the purchase price of a machine, the defense being a breach of warranty, it was competent for witnesses to testify as to their opinion on the question whether the machine was fitted for the work it was guaranteed to do, when the witnesses were qualified by training and experience to express an opinion that would aid the jury to a correct conclusion, and where this training and experience was acquired by the use and operation of machines of like kind and make, identical in principle, structure and operation; and though the witnesses had not had personal observation of the very machine which was the immediate subject of inquiry.

ACTION heard on appeal from a justice's court, before *Lyon, J.*, and a jury, at April Term, 1908, of EDGECOMBE.

Verdict and judgment for defendant, and plaintiff excepted and appealed.

Paul Jones and *W. O. Howard* for plaintiff.

No counsel *contra.*

HOKE, J. This was an action to recover on certain notes given by defendant to plaintiff for the purchase price of one

or more "cold tire setter" machines bought by defendant of plaintiff, the manufacturer, through its agents, the Fulford Hardware Company, of Washington, N. C. It does not distinctly appear from the record whether there were one or more of these machines or whether they were No. 1 or No. 2; nor does this seem to be a matter of importance. Defendant answered by way of defense that the notes sued on were given by him for the purchase price of a certain "cold tire setter" machine manufactured by plaintiff and sold to defendant with a warranty that it would do work of a certain kind and quality, and that on trial it was found totally unfitted for the work it was guaranteed to do, and the question of defendant's liability was made to depend on whether there had been a breach of the warranty, as stated.

There was evidence offered by defendant in support of his allegations, and that plaintiff manufactured machines known as "cold tire setters" Nos. 1 and 2, and that the Fulford Hardware Company, of Washington, N. C., was plaintiff's agent for the sale of the machines, from whom defendant purchased one or more of the machines in question; and, in support of his contention that the machine would not do the work it was guaranteed to do, defendant was allowed to introduce, over plaintiff's objection, the evidence of J. H. Corey and Robert Greene, as follows:

J. H. Corey: "Some four or five years ago I bought a House cold tire setter, No. 2, of the House Cold Tire Setter Company, of St. Louis, Mo., through the Fulford Hardware Company, of Washington, N. C., that would not do the work it was manufactured to do at all satisfactorily. I gave it a full and fair trial and had several mechanics endeavor to operate it, but they were unable to do so with any degree of success. In using this machine it would dish and bend the spokes in certain parts of the wheel more than in others, and would crimp the tire instead of taking up the slack, and the grip of the machine, which was to hold the tire while

pressure was applied, would not hold it. We could not operate it, and discontinued its use."

Robert Greene: "I am a buggy manufacturer and have been for twenty-five or thirty years; am familiar with both No. 1 and No. 2 House cold tire setter machines; same kind and make of machine in controversy. Both machines are alike in construction and in all respects, except that one is larger than the other. The principle in both machines is identical. I had a No. 1 House cold tire setter machine manufactured by plaintiff. It would not work; it would not 'take up,' but would crimp the iron. I tried it two years and then threw it away. The Fulford Hardware Company, of Washington, N. C., was agent of the plaintiff."

We think the court below made a correct ruling in admitting the testimony of these witnesses. Both of them seem to have testified as experts, and the witness Greene fully qualified himself as such; but, whether they were so examined or not, both of them showed that by training and special opportunity to note and observe relevant facts they were qualified to give an opinion on the matter in question that was calculated to aid the jury to a correct conclusion. Such testimony has a recognized place in the law of evidence. McKelvey on Evidence, pp. 230-235; Lawson on Expert and Opinion Evidence, 503. This last author speaks of it as "opinion evidence from necessity," and on page 515 mentions machinery as one of the subjects which especially permit the reception of this kind of testimony, citing the cases of *McCormic Co. v. Cochrane,* 64 Mich., 636, and *Levers v. Box Co.,* 50 N. E., 877, the former being a case not unlike the one we are now discussing. True, it is usually required for the reception of such testimony, not in strictness expert evidence, that the witness should have observed the very machine or implement which is the subject-matter of dispute; and the witness Greene seems to have done this, for he speaks as one having knowledge of this machine from

personal observation. But we do not think the requirement in any event should be held to exclude this testimony, when the witness speaks as to the operation of a machine of like kind and make, and there is no question or dispute but that they are all made by the same company and on the same plan, identical in "principle, structure and operation." In such case, and certainly where there is no claim that the machines are different, while the witness in terms refers to the machine he actually tried, this is only by way of illustration and in support of his opinion; and his testimony, as a matter of fact, bears on the machine in dispute and is directly relevant to the issue.

We are of opinion that no reversible error appears in the record, and the judgment in favor of defendant should be affirmed.

No Error.

J. A. JONES v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 October, 1908.)

1. **Carriers of Goods—Records—Corroborative Evidence.**

In an action against a carrier for damages arising from an injury to stock *en route*, an "original record" of one of the freight conductors, tending to show that the stock was not so injured, is incompetent, unless corroborative of the direct testimony of the conductor who made the record.

2. **Carriers of Goods—Live Stock Injured—Possession of Carriers—Presumptive Evidence—Rebuttal.**

Plaintiff's action is against the carrier to recover for injury to live stock in transit, including the killing of a horse. There was evidence tending to show the injury was received while the stock was in defendant's possession: *Held*, (1) the evidence made out a *prima facie* case against the carrier; (2) it was proper for the court to charge the jury, upon supporting evidence, that if the horse died from natural causes or was injured as an ordinary incident of handling a car of stock, the presumption of negligence would be rebutted; and this rule would apply to all the stock delivered in a damaged condition.

ACTION tried before *W. R. Allen, J.*, and a jury, at May Term, 1908, of CRAVEN, to recover damages alleged to have been sustained by plaintiff in shipment of a car load of horses and mules.

These issues were submitted to the jury:

1. "Was the mule in controversy delivered to the defendant?" Answer: "No."

2. "Was the gray horse in controversy injured while in possession of the defendant?" Answer: "Yes."

3. "Were the twenty-three animals delivered by defendant to plaintiff injured while in possession of defendant?" Answer: "Yes."

4. "If so, was said injury caused by the negligence of the defendant?" Answer: "Yes."

5. "What damage, if any, is plaintiff entitled to recover?" Answer: "Three hundred and thirteen dollars and twenty-five cents."

From the judgment rendered the defendant appealed.

R. A. Nunn and *W. D. McIver* for plaintiff.
Moore & Dunn for defendant.

BROWN, J. The evidence tends to prove that there was delivered to defendant a car load of horses, at Augusta, Ga., for shipment to plaintiff at New Bern, N. C.; that the stock were in good condition when delivered to defendant, and that when the car arrived at New Bern the animals were in a very bad condition—much worse than stock generally are at the end of a long journey; that one horse was dead in the car and the others badly bruised and much injured.

For the purpose of proving the condition of the stock when transferred from one freight conductor to another on different parts of its system, the defendant offered in evidence "the original record of conductor (E. D. Skinner) handling this shipment from Florence to Wilmington, showing that there

was no exception to the condition of the stock at the time of its handling." This was excluded, and defendant excepted.

We have held that a record containing entries made in the usual course of business on the train sheets by the witness (a train dispatcher) from reports telegraphed to him by station agents as to the arrival and departure of trains is admissible for the purpose of showing the position of a train at a certain time. *Insurance Co. v. Railroad,* 138 N. C., 42. The evidence offered by defendant is far from coming within the principle of that decision. The record was made in that case by the witness himself, who was under oath and subject to cross-examination, and the witness identified it as the record made by him, showing the movement of trains. The report of the case shows that "the record was offered by defendant in corroboration of witness Hunt, and the court admitted it for that purpose, so instructing the jury." (Record, p. 45.)

Waiving the confusion in the record as to the identification by proof of this "original record," it is certain that the defendant did not offer Conductor Skinner to prove the condition of the animals on his run, and then offer his train record of that run for the purpose of corroborating his evidence.

It has been held by the Supreme Court of Massachusetts that train dispatchers' records, properly identified, are competent evidence to show the location of a train at a given time, but an examination of the case shows that "entries from the train sheet, *with the testimony of the person who made them,* were admitted to show that outward trains passed" at certain hours. *Donovan v. Railroad,* 158 Mass., 450.

These decisions rest upon the idea that, as telegraphic messages are read by sound, as well as automatically recorded in symbols, such entries stand upon the same footing as if made from oral statements uttered at the sending station and audible in the dispatcher's office. These cases, for that reason, are to be distinguished from those holding that entries

by a servant on his master's books for goods sold are incompetent, unless the servant is called to support the charges and prove the delivery. *Miller v. Shay,* 145 Mass., 162.

There is nothing in the record of a train run or the log book of a ship which takes the case from the general rule that the entries must be identified, and when so identified they are competent evidence in support of the person who made them.

As the appellant failed to send up the "train record," we are unable to gather exactly what it was expected to prove by it. As we understand it, the record was silent as to the condition of the stock on Conductor Skinner's run. Had he been examined as a witness, his record of the run would have been competent to corroborate and fortify his evidence. As he was not examined, the court properly excluded it.

There are a number of exceptions to the charge which need not be considered *seriatim.*

His Honor properly instructed the jury that if the stock was injured while in the possession of the defendant, this fact alone is evidence of negligence, and the defendant is called upon to rebut it. Proof of injury makes out a *prima facie* case of negligence sufficient to carry the case to the jury, and, after hearing such evidence as the defendant offered to prove how the injury occurred, it is for the jury to say whether it was due to defendant's negligence or to other causes for which defendant is not responsible. *Meredith v. Railroad,* 137 N. C., 478, and cases cited.

The rule is based upon the inability of the shipper to produce any other evidence of negligence while his property is in transit in the carrier's possession. 1 Elliott on Evidence, 141. In view of the possibility of injury to live stock from causes not to be attributed the carrier's neglect, his Honor instructed the jury: "If the horse in controversy died from natural causes or was injured as an ordinary incident of handling a car of stock, then this would rebut the presump-

tion of negligence on the part of the defendant company. This same rule would apply as to stock actually delivered to the plaintiff, if you find that it was delivered in a damaged condition."

We think, taking the charge of the learned Judge as a whole, that he put the case to the jury fairly and fully, and that no error was committed which necessitates another trial.

No Error.

CARL C. HARPER ET AL. v. H. D. HARPER, JR.

(Filed 14 October, 1908.)

1. **Wills, Holographs, How Proven—Found Among Valuable Papers—Safe.**

When there is evidence tending to show that a paper-writing purporting to be the will of the deceased was altogether in his handwriting and signed by him, and that it was found in a drawer in his iron safe, where he kept notes he had received for money loaned, with other papers, and that it was written on the envelope in which he had kept accident insurance policies, which therein were disposed of, it was not error for the trial Judge to instruct the jury that, if they found the facts accordingly, from the greater weight of the evidence, it would establish the validity of a holograph will under the terms of the statute, whether or not there was any other paper in the same drawer with this particular writing when found.

2. **Wills, Interpretation of—Estate—Property Disposed of—Partial Intestacy.**

A holograph will, written on the back of an envelope containing policies of accident insurance, bequeathed the amount of the policies to the three daughters of testator. It was stated in the will that the son "has had his full share of mine and his mother's estate"; that if any of the children show a "reckless disposition to spend money, only a part of my estate be given them," etc.; that "personal property he disposed of," etc.; disposition was made of children, and their education was provided for, and persons named were requested "to be trustees for my children": *Held*, (1) that the statement that the son had been fully provided for excluded him from further participation; (2) that the expression, the "personal property be disposed of,"

meant its conversion into money, and evidenced the intent that the personal property was not the sole object of the will; (3) there is no intention indicated to restrict the will to either kind of property or of partial intestacy, or to restrict the operation of the will to the lapsed accident policies enclosed in the envelope upon which it was written.

3. Joinder of Action—Wills, Construction of—Devisavit Vel Non.

While it is unusual for the question of *devisavit vel non* and a prayer for the construction of a will to be united in the same action, yet when all the parties appear and request that the whole matter be determined, the question of jurisdiction does not arise, and in this case they were accordingly passed upon.

ACTION tried before *Neal, J.*, and a jury, at June Term, 1908, of LENOIR.

Defendant appealed.

Rouse & Land for plaintiffs.

Loftin, Varser & Dawson for defendant.

CLARK, C. J. Action by children of deceased and the executor to determine whether the paper-writing, which had been previously probated by the Clerk, is the will of the deceased, and if so, for its construction.

The paper, it is admitted, was wholly in the handwriting of the deceased and was found in his iron safe in the dental office which he occupied. The safe was locked. The combination to the safe was in possession of the son of deceased. It was in evidence that the safe was used by the deceased for keeping money, book of accounts, relics, material for teeth and notes for money loaned. When the safe was opened this paper was found in one of the drawers with some other papers, but it does not appear whether they were valuable or not. There was a small amount of money in the safe. The other drawers were not examined when this paper-writing was found. J. W. Grainger testified that he knew the handwriting of the deceased; also that he had seen the deceased use the safe for books, notes, etc., for some time before he died—could not say how long; that he (witness) "has had

papers there himself." The above evidence was excepted to, but was competent to show that the safe was used for the purpose of keeping valuable papers.

The last paragraph of the evidence of J. W. Grainger was further excepted to because he was one of the "advisory committee" named in the alleged will, and that this was a transaction with the deceased and incompetent, under Revisal, sec. 1631. If it be conceded that being "one of the advisory committee"—an as yet unaccepted trust and without compensation—made the witness "interested in the event of the action," his "having papers in the safe himself" was not a "transaction" with the deceased—certainly not within the meaning of the statute. It was not to show any dealing with the deceased, but merely evidence that the witness considered the safe a suitable place in which to deposit papers for safekeeping. He does not say that the deceased gave him permission—presumably he did—but the evidence is not for that purpose, but to show from the witness' own conduct that the safe was a proper depository for a will.

The court charged the jury that if they "should find from the greater weight of the evidence that the deceased had at his place of business an iron safe, in which he usually kept his books, accounts and valuable material he used in the practice of his profession, his money and notes he had taken for money loaned, and that he used the said safe for keeping his valuable papers and effects; and if you further find from the greater weight of the evidence that a few days after the interment of the deceased the paper-writing here presented to you was found in a drawer in the said safe, with the combination locked, why, that would meet the requirements of a reasonably just and fair construction of the terms of the statute—'among his valuable papers'—and this would be so, whether there was or was not any other paper in that particular drawer of the safe." This was excepted to, but we find no error therein. In *Sheppard's will,* 128 N. C., 56, it is said:

"The intention of the statute is that it shall appear to be a will, whose existence and place of deposit were known to the testator, and that he had it in his care and protection, preserving it as his will." This paper was found, not only in the iron safe where the deceased was shown to have kept valuable papers, but (though the nature of other papers in that drawer was not shown), it was written on the outside of the envelope which contained the accident insurance policies referred to and disposed of in the paper-writing, and therefore deemed valuable papers by the testator. The jury found that the paper-writing was the will of the deceased.

The will, entirely in the handwriting of the deceased, was written, as above stated, upon the outside of the envelope containing two accident insurance policies of $3,000 each. One of said policies bore the same date as the will (7 April, 1903); the other was issued subsequently, and bears date 13 October, 1903. Said will reads as follows:

"In case of my death the enclosed insurance is for my three daughters, Edith, Fay and Mildred. Henry D. Harper, Jr., has had his full share out of mine and his mother's estate. I request the Citizens Bank of Kinston to be trustee of my children, advised by J. J. Harper, C. W. Howard, J. W. Grainger and N. J. Rouse. This request, that if any of the children show a reckless disposition to spend money, that only a part of my estate be given them, and that in such sum as the trustee and advisory board may agree on. My daughters to be placed entirely under J. W. Grainger, Mrs. Capitola Edwards or Mrs. C. W. Howard. Personal property to be disposed of. Other things, as education, when, where and how, are given entirely to the advisors named above. God bless them all.

"Signed and sealed this 7th day of April, 1903.

"H. D. HARPER. [Seal.]"

The testator left surviving him three daughters and two sons, who are plaintiffs in this action, besides his son H. D. Harper, Jr., who is named in the will as having "had his full share of mine and his mother's estate."

The construction of the will is not free from difficulty, but the intent of the testator, as derived from "the four corners" of the will, is what is to be sought for. We think the intent of the testator was:

1. By declaring that "Henry D. Harper, Jr., has had his full share out of mine and his mother's estate," to exclude him from any further share. It could have no other purpose.

2. The request to the Bank of Kinston, "to be trustee of my children" (advised by the committee), was an appointment to administer the estate as executor and, after payment of debts, to hold the surplus as trustee till the minors became of age. The daughters were to be placed with the ladies named, and the education of the children was entrusted to the board of advisors.

3. The expression, "personal property to be disposed of," means simply that it is to be converted into money. This incidental reference to it shows that the personal property was not the sole object of the will. Indeed, it is a wise and well-settled rule that wherever there is a will the presumption is that the testator intended to dispose of all his property. *Brown v. Hamilton,* 135 N. C., 10; *Cox v. Lumber Co.,* 124 N. C., 78; *Blue v. Ritter,* 118 N. C., 580; 30 Am. and Eng. (2d Ed.), 667. There is nowhere any intention indicated to restrict this will to either kind of property. On the contrary, the intent seems to be (after excluding the son who had been already fully advanced) to provide that the trustee shall hold the entire "estate" for the other children, and the testator even provides for the restriction in the advances to be made the extravagant, for the custody of his daughters by ladies named, and for supervision of the education of all the children by a board of gentlemen. There was

nothing indicative of a "partial intestacy," but rather an effort to dispose of everything and to provide for everything. Twice in this short will the testator uses the word "estate," which includes both real and personal property. *Foil v. Newsome,* 138 N. C., 115; *Glasscock v. Gray, ante; Morgan v. Huggins,* 9 L. R. A., 540; Webster's Dictionary; Bouvier's Law Dictionary.

So far from the will being restricted to the policies found in the envelope, the only reference made to them is the single sentence, "In case of my death, the enclosed insurance is for my three daughters, Edith, Fay and Mildred," while the rest of the will is taken up with the care of his "estate," out of which all five of the children not "fully advanced" are to have allowances and be educated, and with provision for the custody of the girls and supervision by an advisory board of all. It may be further noted that these were not life-insurance policies, but merely one-year accident policies, long since expired, and to restrict the will to disposition of them alone would be impossible. The judgment of the court below is in exact accordance with these views.

We note that this proceeding, brought to term, includes both the issue of *devisavit vel non* and proceedings for the construction of the will. This is certainly unusual, but all the parties are before us, and ask that the whole matter be determined in this action. It is not a question of jurisdiction (which we would be compelled to notice *ex mero motu*), for the Clerk is part of the Superior Court. No exception is taken, and the whole matter, under the consent and request of parties, is disposed of. We find

No Error.

W. H. COX v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 October, 1908.)

1. **Penalty Statutes—Interpretation—Strict Construction.**
Penalty statutes are strictly construed, and to recover thereunder the plaintiff must bring his case clearly within the language and meaning of the law.

2. **Same—Carriers—Accepting Freight—Evidence—Nonsuit.**
When it appears that the plaintiff, in an action against a carrier for failure to accept freight for shipment when tendered, did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but that they carried it back and shipped it the next day, a motion as of nonsuit upon the evidence should be allowed.

ACTION instituted before a justice of the peace for the recovery of the penalty of $50 for alleged failure of defendant to accept freight for shipment when tendered, under section 2631 of Revisal. Defendant denied that the freight was tendered. Upon appeal, the cause was tried before *Neal, J.*, and a jury, at March Term, 1908, of LENOIR.

The evidence upon which plaintiff relies to establish a general tender for shipment is as follows:

L. D. Dixon testified: "Mr. W. H. Cox gave me the meat to be carried to the Atlantic Coast Line depot on the morning of 8 January, 1907, at about 8 o'clock. Mr. Fulton was with me on the wagon. We got to the depot at about 8:10 A. M., and I went up to a man who was delivering freight in the Atlantic Coast Line warehouse, told him that I had some meat there for shipment to Greenville, and that I wanted to get it off on the morning train. He said it was too late to get it on that train—that he did not have time to fool with it, as the train was made up. I told him that it was weighed and tagged, and that I would put it on the train myself. He said, 'Wait a minute,' and went in the ticket office, and in a few minutes came back with another man, and they came to the wagon and said it was too late to get it off on that train. I

did not know the names of either of the men, or that they worked there at the time, but I now think that one of them was Mr. Marrow. I made no further effort or offer to leave the meat there, but in a few minutes drove back down town with it. I carried the meat back to the station the next morning and it was shipped to Greenville. It was fresh pork."

W. J. Fulton, for the plaintiff, testifies: "I was with Mr. Dixon on the morning of 8 January, 1907, and went with him on the wagon to the Atlantic Coast Line depot. I did not leave the wagon, but saw Mr. Dixon say something to a man in the warehouse; I did not know who it was. This man and Dixon came back to the wagon, and the man stated that it was too late to get the meat off on that train. This was about ten minutes after eight. We waited there a few minutes, and then drove back down town to Mr. W. H. Cox. I did not offer to leave the meat at the depot, nor did I hear Mr. Dixon offer to leave it there."

There were motions to nonsuit in apt time, which were overruled, and defendant excepted. There was a verdict for plaintiff, and from the judgment rendered thereon the defendant appealed.

Wooten & Clark and *E. R. Wooten* for plaintiff.
Rouse & Land for defendant.

BROWN, J. It is a well-established principle of law, applicable to corporations and individuals alike, that penal statutes are strictly construed, and that he who sues to recover a penalty awarded by the law must bring his case clearly within the language and meaning of the law. *Sears v. Whitaker,* 136 N. C., 37; *Appenheimer v. Railroad,* 64 Ark., 27; 26 Am. and Eng. Enc. (2d Ed.), p. 658.

It is clear, from a perusal of the evidence, that no general tender of the meat for shipment was made by plaintiff's agent. Taking it in its best aspect for plaintiff, the evidence shows that the meat arrived too late for the morning train, and,

finding that it could not be shipped by that train, plaintiff's employees voluntarily and purposely carried it back to plaintiff's market, and returned with it and shipped it next morning. The defendant incurred no penalty for not shipping by that particular train, for, by section 2632, Revisal, the carrier is allowed two days at the initial point in which to begin the transportation of freight.

If the evidence is true, the language of the defendant's employee, refusing to accept the meat for shipment by that particular train, was discourteous and unwarranted, but it does not subject the company to punishment on that account.

We think the Judge below should have allowed the motion to nonsuit and have dismissed the action. It is so ordered.

Error.

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF D. J. KNOWLES.

(Filed 14 October, 1908.)

1. **Executors and Administrators—Insolvency of Executors—Removal—Waste.**

An executor will not be removed for insolvency, upon petition of those interested in the estate, if such was his condition in the lifetime of his testator and known to him, when there is no evidence of waste or misapplication of funds.

2. **Same—Bond.**

A bond will not be required of an executor because of his insolvency, unless there is evidence of his wasting the estate of his testator or misapplying the assets, or danger that a *devastavit* will be committed.

3. **Same—Personalty Incident to Enjoyment of Land—Right of Use and Consumption—Remainder.**

In an action to require an executor to give bond for the alleged ground of insolvency and that a *devastavit* has been committed, the will devised and bequeathed to the wife "all my personal property, to use as long as she lives," with limitation over; also to her during her life "full privilege and control" of the land and real estate, with limitation over. Under citation

from the Clerk, the executors filed inventory showing payment of all debts and delivery to the wife of certain moneys, household and kitchen furniture, and also certain products from the land: *Held*, (1) the use of the personal property was incident to the enjoyment of the land, and was properly delivered to the widow, to be used by her for her support in keeping with her condition and standing in life; (2) what was not consumed will at her death go to the remaindermen; (3) an order requiring the executors to file a statement of their account, with permission given petitioners to apply for a receiver, if it appeared they were wasting the estate, afforded full protection to the remaindermen.

4. Executors and Administrators—Waste—Wills, Interpretation of. When it is necessary to construe the will, in an action against the executors for waste, to determine the questions involved, the court will do so to that extent and for that purpose only.

HOKE, J., concurs in result.

ACTION heard by *Neal, J.*, at May Term, 1908, of SAMPSON.

David J. Knowles, lately domiciled in Sampson County, died in November, 1907, having first made and published his last will and testament, the first item of which is in the following words: "I give, devise and bequeath unto my wife, Margaret Knowles, all my personal property, to use as long as she lives, and at her death to be equally divided among my children, my grandchildren, Fred Knowles and Leona Knowles, to share as one child. Also, I give unto my wife during her lifetime full privilege and control of my land and real estate." In another item he gave all the "rest and residue" of his personal property or real estate, to be equally divided between his children and grandchildren. He appointed his wife, Margaret Knowles, and A. W. Knowles executors, etc. The will was duly admitted to probate on 8 November, 1907, and the executors duly qualified. On 27 December, 1907, the executors returned to the court an account of sale of a portion of the personal property which came into their hands from the estate of their testator, amounting to $121.32. On 15 February, 1908, the petitioners filed in

the Superior Court a petition alleging that they had an interest in the real and personal property of the testator; that at the time of his death he had a large amount of cash on hand, besides notes and other solvent credits, and a great deal of personal property, which ought to have come into the hands of the executors; that they had failed to file an inventory, as required by law; that they were insolvent, etc., and praying that they be required to file an inventory and to show cause why they should not be required to give a justified bond, and, in default thereof, that they be removed. Pursuant to the petition, the Clerk issued a citation to the executors to show cause, etc. In reply to said notice the executors filed their answer, admitting that certain personal property came into their hands, and averring that they were not concerned as executors with any of the personal property, saving and excepting a sufficiency to pay off the debts of the testator, and that they had sold enough for that purpose and had settled all of the debts, etc.; that, under the terms of the will the widow, Margaret Knowles, was given all of the personal property. They deny the right of the petitioners to question their management of the estate. On 9 March, 1908, the Clerk made an order directing the executors, on or before 19 March, 1908, to file an inventory, etc. On said day the executors filed an inventory of the personal property, which was delivered to or retained by the widow, under the provisions of the will, consisting of two mules, one horse, eleven head of cattle, nine hogs, one wagon, a lot of household and kitchen furniture and some agricultural implements, twenty barrels of corn, 1,000 pounds of shucks, 500 pounds fodder and $580 in money. The money was deposited in the bank, to the credit of Mrs. Knowles. They also filed an account showing the receipt of $121.32 from sale of property and the payment of $168.68 on account of debts, burial expenses, tombstone, doctor's bill, taxes, attorney's fees, etc. On the hearing the Clerk found upon the evidence and exhibits that

the executors were competent to manage the estate of their testator, and that it had not been squandered or misapplied, and that no fraud had been practiced or attempted to be practiced. He rendered judgment dismissing the petition and taxing the petitioners with the cost. From this judgment petitioners appealed to the Judge, who affirmed the judgment requiring the executors to file in the Clerk's office every four months a statement of their account, with permission to petitioners, if it appeared that they were wasting the estate, to apply for the appointment of a receiver. From this judgment petitioners appealed.

Fowler & Crumpler and *John D. Kerr* for executors.
Faison & Wright for petitioners.

CONNOR, J. We concur with the order made by his Honor affirming the action of the Clerk. It is settled that the court will not remove an executor by reason of insolvency, when such condition existed at the time the will was executed and was known to the testator, unless it appears that he is wasting or misapplying the assets. *Barnes v. Brown*, 79 N. C., 401; *McFadgen v. Council*, 81 N. C., 195. In the absence of any such reason, or any well-grounded apprehension that a *devastavit* will be committed, a bond will not be required. The Clerk in this case finds that the property sold by the executors has been duly accounted for and the debts paid, and the accounts filed and made a part of the record sustain the finding.

The petitioners, however, insist that by delivering to the widow the personal property not sold, including the money on hand, the executors have committed a *devastavit*. They contend that it was the duty of the executors to have sold the property and with the proceeds, together with the money on hand, created a fund, to be invested during the lifetime of the widow, paying to her the interest, to the end that upon her death the *corpus* be paid to them. The learned and diligent counsel cited to us a number of cases which he con-

tended sustained his view. It is, of course, the duty of the court, in all cases involving the construction of a will, to ascertain and effectuate the intention of the testator. This, it has been wisely said, is the "pole star" by which the court will be guided. While this statutory proceeding is not in a strict sense a suit to have the will construed, it becomes necessary to do so for the purpose of ascertaining whether, in delivering the property and paying the money to the life tenant, the executors have committed a *devastavit*. For this purpose only, and not for the purpose of concluding the parties in interest in any other properly instituted proceeding, we proceed to consider the duty of the executors under the provisions of the will. In *Smith v. Barham*, 17 N. C., 420, *Ruffin, C. J.*, discussed the question respecting the duty of the executor when specific articles are given to one for life, with remainder over, and when, after disposing of his estate by specific bequests, the testator gives the residue to one for life, with remainder over. While conceding the difficulty of carrying out the intention of the testator in "most cases" by following the "positive and ancient rule of the common law," he concludes, that "When a residue is given as such, it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving as *corpora*, not knowing how much or which of them it may be absolutely necessary to sell for payment of debts and pecuniary legacies. When there is a gift of a specific chattel for life, and then over, the executor may assent to the legacy and discharge himself from liability to the remainderman by delivering it to the tenant for life, for the assent to that legacy is an assent to the one in remainder." The Chief Justice notes that it was formerly held that the executor should take from the legatee for life a bond that the article should be forthcoming at his death, but that now, unless there is collusion, the life tenant is only required to give a receipt

to the executor, unless there is cause to believe that the article will be destroyed or sent away. The rule laid down in *Smith v. Barham* was followed in *Jones v. Simmons,* 42 N. C., 178. As in *Barham's case,* there was a gift for life of the residue, subject to the payment of debts. In *Ritch v. Morris,* 78 N. C., 377, the gift for life was subject to the payment of debts and charges of administration. *Judge Bynum,* with his usual industry and clearness, reviews the cases which, at first glance, appear to be conflicting, and shows that they follow the distinction made or rather pointed out in *Smith v. Barham, supra.* Referring to the cases in which the executor was directed to deliver to the legatee for life the articles bequeathed, he says: "There being no bequest of a *general residue* for life, these latter cases have no application, and *Smith v. Barham, supra,* stands unopposed to any of the cases we have reviewed." We note some of the cases referred to by *Judge Bynum.* In *Taylor v. Bond,* 45 N. C., 5 (25), *Pearson, J.,* referring to *Barham's case* and *Jones' case, supra,* says: "In those cases a mixed and indiscriminate fund is given as a *residue* to one for life, with a limitation over." Enumerating the distinctive features of the several wills, he says: "The very object of the gift is that Mrs. Ashburn may be supported by the *use of the property.*" The same conclusion was reached, for the same reason, in *Williams v. Cotten,* 56 N. C., 395. In *Chambers v. Bumpass,* 72 N. C., 429, the bequest was "all of the residue of my estate," etc. *Pearson, C. J.,* finds in this language "the intention of the testator that the plaintiff should enjoy the use of his house, furniture, farming implements, specifically, during her life or single state, and not that she should have the interest or what it should sell for." He says: "This is not a residuary legacy, but a universal legacy." The Chief Justice cites none of the authorities. It is not necessary that we shall inquire whether the decision is in harmony with *Smith v. Barham;* in any view it sustains the judgment in

this appeal. In *Hodge v. Hodge,* 72 N. C., 616, there was a legacy of money for "the use and benefit" of one for life, remainder over. The Court held, upon the authority of *Camp v. Smith,* 68 N. C., 537, that the executor should pay the money to the legatee without requiring bond. *Settle, J.,* says: "The principle seems to be that, as the testator has entrusted him with the money without requiring security, no person has authority to do so." In *Britt v. Smith,* 86 N. C., 305, the testator gave to his wife "all of my personal property" during her natural life or widowhood, and after her death or widowhood, over, etc. *Ruffin, J.,* reviewed the authorities, saying: "So far as we have been able to inform ourselves, from a critical examination of all the adjudications upon the subject to which we have access, no operation has in any instance been given to the rule (in *Barham's case*), save in the case of a *residuary bequest* given *eo nomine* as such." The language of the learned Justice is so appropriate that we quote it as conclusive of this appeal. He says: "We are struck at the very outset with the strong purpose manifested by the testator to make an ample and certain provision for his wife. By one comprehensive clause he gives her *all* his lands for life, and, with the slight exceptions indicated, *all* his personalty, the latter consisting in a great degree of articles absolutely essential to the enjoyment of the former and, indeed, we may say, necessary to her immediate comfort and support, and such as she could not supply, in the event of a sale, without incurring debt or other inconvenience." The language of the will in this appeal, the age of the wife, the inventory showing the character of the property bequeathed, all point with unerring certainty to the intention of the testator. It is the expression of the purest and highest sentiment and manifest duty of the husband to provide for the comfort and welfare of the wife, free from molestation or interference on the part of those whose duty it is to be her aid and comfort, after a lifetime spent in their

rearing and support: It would do violence to the testator's sense of obligation and duty to so construe this provision for his widow as to strip her of the substance gathered by their joint industry and frugality, sell the household and kitchen furniture, not only necessary to her comfort, but having sacred association with her married life, its joys and sorrows. To give her land and leave her without supplies, implements, teams and other necessary property to make it contribute to her support would be most unreasonable and unjust. The property and money are hers, to use for her support and comfort. The executors properly delivered them to her. They have paid the debts and funeral expenses and, so far as this record shows, freely discharged their duty according to law. She is entitled to use the property, including the money to supply her needs, for her support in the state and manner suited to her age, health and condition in life. The inventory shows what she has received, and what has not been consumed in the use will at her death go to the petitioners. But it is said that she claims it all as her own, to do with as she pleases, and should therefore be required to give security. His Honor's judgment fully protects them. Complaint is made that the costs are taxed against the petitioners. The Clerk's findings of fact, sustained by his Honor, show that they were overanxious about the widow's legacy. Failing to sustain the charge of misconduct, it is but just that they pay the cost. The statute so directs. The judgment is

Affirmed.

RALEIGH IRON WORKS v. SOUTHERN RAILWAY COMPANY.

(Filed 14 October, 1908.)

Penalty Statutes—Constitutional Law—Commerce Clause.

Sections 2634 and 2644 of the Revisal, imposing certain penalties against common carriers, are not unconstitutional as in violation of the Fourteenth Amendment to the Federal Constitution, or the Commerce Clause (Art. I, sec. 8) of said Constitution, and the acts passed in pursuance thereof.

ACTION from a justice of the peace, tried on appeal before *Biggs, J.*, at February Term, 1908, of WAKE.

A jury trial having been waived and the cause tried by the court, recovery was had by plaintiff for an amount demanded as damages and for certain penalties claimed as arising under sections 2634 and 2644 of the Revisal.

From judgment rendered the defendant excepted and appealed, assigning errors as follows: "The defendant contends that the statute is unconstitutional and void, in that, (1) it is in violation of Article I, sec. 8, of the Constitution of the United States, commonly known as the Interstate Commerce Clause; (2) that it is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it is class legislation and is the taking of the property of the defendant without due process of law, and it denies to the defendant the equal protection of the laws; (3) that if the statutes be constitutional they have no application to interstate shipments of goods, and therefore do not apply to this case; (4) that said act is inoperative and void because in conflict with the act of Congress of 24 June, 1866; (5) that the said act prescribing a penalty for an overcharge, if the same be applicable to this case, is void, because it conflicts with the provisions of the act of Congress known as the Interstate Commerce Act of 11 February, 1887, as amended by the act of 29 June, 1906, known as the Hepburn Act, and various other amendments."

J. W. Hinsdale, Jr., for plaintiff.

A. B. Andrews, Jr., for defendant.

PER CURIAM: It was chiefly urged for error on the part of the defendant that the State legislation in question, imposing certain penalties for alleged default on the part of defendant, is unconstitutional, (1) in denying said defendant the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; (2) in imposing unlawful burdens and restrictions upon Interstate Commerce, contrary to Article I, sec. 8, of said Constitution.

The questions thus raised have been recently presented in several cases on appeal before this Court, and have been decided adversely to defendant's position, notably, in *Efland v. Railroad* (defendant's appeal), 146 N. C., 135; *Morris & Co. v. Express Co.,* 146 N. C., 167; *Harrill v. Railroad,* 144 N. C., 540; *Cottrell v. Railroad,* 141 N. C., 383.

The constitutionality of these penalty statutes was so fully discussed in those cases that the Court does not consider that further statement on the subject is required. For the reasons given in those opinions, and on the authorities there cited, the exceptions of defendant are overruled and the judgment below

Affirmed.

THE JOHN SLAUGHTER COMPANY v. THE STANDARD MACHINE COMPANY.

(Filed 21 October, 1908.)

1. Pleadings—Demurrer—Principal and Agent—Sales Agent Furnished—Damages.

When it is alleged that defendant was to furnish plaintiff an experienced and successful sales agent for goods sold to it, and damages are claimed on account of the agent furnished having run away with plaintiff's horse and buggy and embezzled its funds, but it is not alleged that defendant knew that the character of the agent was bad, a demurrer to the complaint should be sustained. The agent furnished by the defendant became the plaintiff's agent alone when it employed him.

2. Pleadings—Demurrer—Contracts—Counterclaim, When Available.

In an action for damages claimed by reason of embezzlement by a sales agent furnished to plaintiff by defendant, it is admissible, under Revisal, sec. 481, for defendant to set up a counterclaim for the price of the machines it was alleged that the agent was furnished to sell, though the price for a part of the machines became due after the commencement of the action; for the counterclaim is a cause of action connected with the subject-matter of the action, and one arising on contract and existing at the commencement of the action on the contract.

3. Same—Judgment on Counterclaim.

When in reply to an answer alleging a counterclaim the plaintiff denies liability thereon on the ground that an installment of the counterclaim became due after the commencement of the action, judgment on the counterclaim may be properly rendered if it arose out of the same transaction.

ACTION tried before *Guion, J.*, and a jury, at June Term, 1908, of WAYNE.

The defendant demurred to the complaint and set up a counterclaim. The demurrer was sustained and judgment rendered against plaintiffs for the amount of the counterclaim. Plaintiff appealed.

J. L. Barham, W. T. Dortch and *W. C. Munroe* for plaintiff.

Isaac F. Dortch and *Aycock & Daniels* for defendant.

CLARK, C. J. The court rendered judgment upon the pleadings. It appears therefrom that the plaintiff admits the purchase of the sewing machines at the price stated, but seeks to recover damages because, as it alleges, the defendant agreed to furnish the plaintiff an experienced and successful agent to sell the machines, and that said agent embezzled the horse and buggy furnished him and ran away with certain collections made by him. The defendant denies agreeing to furnish the agent, but, the judgment being rendered on the pleadings, this must be taken as true. When furnished, the agent became the agent of the plaintiff, and any loss from his misconduct falls upon the plaintiff. The defendant is not liable, unless the defendant knowingly or negligently or fraudulently imposed a bad servant upon the plaintiff, and this is not alleged in the complaint. It does not appear that the agent had not been successful and was not experienced. It is alleged that the agent proved to be dishonest, but it is not averred that his character was known by the defendant to be bad. The complaint avers that the said agent committed the acts of dishonesty "while so engaged in the employment of the plaintiff." He could not be the agent of both the plaintiff and defendant in selling machines for the plaintiff. The plaintiff bought the machines to resell. It could not be that the defendant agreed through its own agent to sell them for plaintiff.

The defendant was a manufacturer of sewing machines. The plaintiff company was engaged in the business of buying and retailing them. The allegations in the complaint, taken as true, do not impose any liability upon the defendant for the dishonesty of the agent it sent to the plaintiff and the latter employed.

The counterclaim for the price of the sewing machines is admissible under both divisions of Revisal, sec. 481: (1) It is a cause of action connected with the subject of the action; indeed, it arises out of the same transaction. In such case

it is immaterial whether plaintiff's claim arises in tort or contract. *Bitting v. Thaxton,* 72 N. C., 541; *McKinnon v. Morrison,* 104 N. C., 354; *Branch v. Chappell,* 119 N. C., 81. (2) In an action on contract, any other cause of action arising on contract and existing at the commencement of the action.

It is true the reply denies that the plaintiff owes the sum set up in the counterclaim, but that is a conclusion of law, for the purchase and price of the sewing machines are admitted, and the liability therefor is denied solely on the ground that the agent recommended by the defendant and employed by plaintiff proved to be dishonest. The second installment of purchase money for the machines fell due after the beginning of this action, but before the trial. "Arising out of the same transaction," it was available. It is only when the counterclaim is "another cause of action" arising on contract that it must "exist at the commencement of the action." Revisal, sec. 481 (2). This is not required under subsection 1 of Revisal, sec. 481. *Smith v. French,* 141 N. C., 8. While the counterclaim is for a second purchase of machines, section 3 of the reply alleges that such second purchase was made upon the inducement that the defendant was to send plaintiff a successful and experienced agent. This was a part of the same transaction. The subsequent conduct of the agent was not; but for that, as we have seen, the defendant is not liable, upon the allegations pleaded.

Affirmed.

G. R. WARREN v. J. S. WILLIFORD.

(Filed 21 October, 1908.)

1. **Deeds and Conveyances—Title—Common Source—Rule of Convenience.**

When both parties to an action for the possession of land claim title from a common source, the plaintiff is not required to show title out of the State.

2. **Same—Evidence—Superior Title.**

When both parties to an action for the possession of land claim title from a common source, one of them is not estopped to show a superior outstanding title, provided he connects himself with such title.

3. **Same—Tax Deed—Instruction.**

When a party to an action for possession of land introduces deeds for the purpose of showing legal title in himself, and also a tax deed held by the defendant to the land, for the purpose of impeaching it, which shows title from a common source with him, it is not error in the trial Judge to instruct the jury that the ownership of the land depends upon the validity of the tax deed.

4. **Deeds and Conveyances—Tax Deeds—Validity—Presumptions—Burden of Proof.**

One relying upon a tax deed for title to lands must show that the statutory requirements necessary to the validity of the deed have been met, for there is no legal presumption in favor of the validity of the deed otherwise than the statute provides.

ACTION tried before *W. R. Allen, J.*, and a jury, at December (Special) Term, 1907, of SAMPSON.

This action is prosecuted by plaintiff to recover possession of the land described in the complaint and to have a tax deed held by defendant declared invalid. The plaintiff, by deeds duly recorded, showed title in R. G. Williford. He then showed a mortgage from R. G. Williford and wife to L. J. Best to secure the payment of an indebtedness of $220; a deed from Best to Tew reciting a consideration of $250, and a deed from Tew to plaintiff, dated 2 January, 1905. It was admitted that on 25 February, 1905, Best transferred and assigned to plaintiff the mortgage from Williford. Plain-

tiff instituted an action, 25 April, 1905, in the Superior Court of Sampson County against R. G. Williford and wife and J. S. Williford, the present defendant. The purpose of said action was the foreclosure of the mortgage from R. G. Williford to Best and to cancel a tax deed which the Sheriff had executed to defendant, J. S. Williford. At the April Term, 1906, defendant, R. G. Williford, having failed to file an answer, plaintiff took judgment by default against him, adjudging a sale of the land for the purpose of foreclosing the mortgage. F. R. Cooper was appointed commissioner to make sale. Plaintiff introduced a deed from Cooper, commissioner, to him, dated 31 September, 1906, duly registered. Plaintiff, for the purpose of attacking and impeaching it, and as estoppel, introduced a tax deed made by J. M. Marshburn to J. S. Williford. This deed was delivered 19 January, 1903. Defendant purchased the land at a sale made for the collection of taxes due by R. G. Williford; the sale was made 31 December, 1901. Plaintiff then read in evidence, over defendant's exception and objection, the evidence of defendant taken before the Clerk, 14 January, 1907, upon notice, etc. The material parts of this testimony show that defendant is the brother of R. G. Williford, who left the State during the month of November, 1901. He says: "I wrote my brother, R. G. Williford, in Virginia, the latter part of 1902 or the first of 1903, that I had bought the land at the tax sale. I never wrote to anyone else about it. * * * L. J. Best tendered me the money that I paid out for the land about the first of April, 1902. He said he would pay the taxes on it if I would tell him how much it was. I told him I did not remember how much it was then. I told him to send the money to the Clerk's office and I would send down the certificate. He never sent the money, that I know of. I never published any notice in any newspaper regarding or concerning the purchase of this land at the tax sale. It was generally reported that R. G. Williford left the State about the first

of November, 1901, but I do not know this of my own knowledge." A newspaper was published at Clinton, in Sampson County. Defendant says that he never published any notice in that or any other paper, nor posted any notice at the courthouse door, concerning the tax sale or his purchase. He never made any affidavit relating to the sale or the purchase. It appears that at the time of the trial no answer had been filed.

It was agreed that the allegations in the complaint should be treated as denied and that defendant could file his answer thereafter. It was understood that the title to the land depended upon the validity of the tax deed, but no restriction was placed upon the right of the defendant to set up any defense in his answer when filed. The usual issues were submitted, without objection, regarding the title to the land and amount of taxes paid by defendant. After the trial the defendant, among other defenses, set up in his answer the statute of limitations. No issue was tendered or submitted upon that defense. The court explained to the jury that the ownership of the land depended upon the validity of the tax deed, and, among other things, charged the jury that if they found from the evidence that the defendant did not file the affidavit (explaining its requirements) provided by sections 63 and 64, chapter 15, Laws 1899, the said tax deed was not valid. Defendant excepted. Verdict for plaintiff. Defendant moved for new trial, assigning errors. Motion denied. Defendant appealed.

F. R. Cooper and *Faison & Wright* for plaintiff.
George E. Butler for defendant.

CONNOR, J., after stating the case: The defendant abandons in his brief the exception to the introduction of his deposition or examination taken before the Clerk. The first exception, therefore, is to his Honor's charge that the plain-

tiff's right to recover depended upon the validity of the tax deed under which defendant claimed title. He says that plaintiff has not shown title out of the State. In view of the pleadings and the chain of title introduced, it appears that both plaintiff and defendant claim under R. G. Williford. This, under the well-settled rule of practice, sometimes called an estoppel on the defendant to deny the title of the common source, relieves the plaintiff of showing title out of the State. This rule of practice has been recognized and followed in this State too long to require discussion. The plaintiff, therefore, having shown a chain of title from R. G. Williford for the purpose of relieving himself of the necessity of showing title out of the State, introduced the deed from the Sheriff to defendant, showing that he also claimed under Williford. This is a common and well-settled practice in the trial of actions of ejectment in this State. The defendant is not estopped to show that he has the better title, notwithstanding the deed from the common source. The only effect of the rule is to dispense with the necessity on the part of plaintiff of showing a grant or thirty years' possession to take title out of the State. The parties are thus brought to issue as to which has the superior title. Plaintiff showed a mortgage from R. G. Williford to Best, thus putting the legal title in him; a deed from Best to Tew, and from Tew to himself. This would have entitled plaintiff to recover against the mortgagee or any person claiming under him. The proceeding to foreclose, followed by the sale and deed from Cooper, commissioner, was not essential to plaintiff's legal title. Its only effect was to cut off R. G. Williford's equity of redemption. It is too well settled in this State to require discussion that the mortgagee is the owner of the legal title and may maintain an action to recover the possession of the land. The plaintiff, having shown the tax deed, unless invalidated by extraneous evidence, put the title in defendant, and he could not recover unless he showed that it was invalid. His Honor,

therefore, correctly told the jury that plaintiff's right to recover depended upon the validity of the tax deed. This again depended upon the effect of defendant's failure, as admitted by himself, to comply with the provisions of sections 63 and 64, chapter 15, Acts 1899, that statute being in force when the sale was made. It is true, as contended by defendant, that the lien for taxes was superior to the mortgage, and if the land was advertised and sold, and purchased by defendant, and he complied with the provisions of the statute and took a deed, his title, thus acquired, would be superior to plaintiff's. The only respect in which the deed is attacked is his failure to comply with sections 63 and 64, chapter 15, Laws 1899. These sections provide that "no purchaser of land sold for taxes shall be entitled to a deed for the land" so purchased "until the following conditions shall be complied with." The conditions, upon the performance of which such purchaser shall be entitled to a deed, are that he shall serve upon the person in the actual possession and also the person in whose name the land is listed for taxation, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption on such sale, a notice containing the information prescribed by the statute. If no one be in possession, and the person in whose name the land was listed for taxation cannot be found, the purchaser is required to publish the notice in some newspaper, etc. Section 64 provides that before he shall be entitled to a deed such purchaser shall make an affidavit that he has complied with the provisions of section 63; that said affidavit shall be delivered to the Sheriff, and by him delivered to the Register of Deeds, who shall register the same, and file it with the records of his office. This Court, in *King v. Cooper,* 128 N. C., 350, held that these "conditions precedent" must be proven outside of the deed, and in the absence of such proof the purchaser acquired no title. There is no presumption that he has done so. *Mat-*

thews v. Fry, 141 N. C., 582. His Honor was manifestly correct in his instruction to the jury. The defendant not only failed to show that he had failed to comply with the condition precedent entitling him to a deed, but expressly admitted that he had not done so.

The defendant makes further exception to his Honor's charge, for that it does not appear that he or the one under whom he claimed had title to the property at the time of the sale. Several answers may be made to this. Plaintiff showed a deed from S. W. Williford to R. G. Williford, dated 16 July, 1895, and registered 31 December, 1904. The land was sold for taxes 31 December, 1901. Defendant says that until the registration of the deed R. G. Williford had no title. This is a misconception of the registration act. The title vests, as against the grantor and all others except "creditors and purchasers for value," from the delivery of the deed. We do not think that this case comes within the language of section 20, Laws 1901. It is true that, construing this section, this Court said in *McMillan v. Hogan,* 129 N. C., 314: "The taxes due must be paid, which the law requires as a condition precedent to contesting the title carried by the deed by authority of the statute." The defendant, having obtained his deed in violation of the express terms of the statute, acquired no title. As was said by *Walker, J.,* in *Matthews v. Fry, supra,* "As the making of a proper affidavit was a condition precedent to the defendant's right to call for a deed, with which he has not complied, he has not acquired title to the land." The deed was simply void, and defendant was not entitled to avail himself of the provisions of the statute intended to protect purchasers at tax sales. This disposes of the exception in regard to the statute of limitations. The plaintiff, having shown that he held the title of R. G. Williford, was entitled to recover. The judgment must be

Affirmed.

MRS. BERTIE LEE SUTTLE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 21 October, 1908.)

1. **Telegraph Companies—Office Hours—Waiver.**

When the agent of a telegraph company receives a message for transmission, and undertakes with the sender to deliver it at a time not within its reasonable office hours at its destination, the benefit of the office hours is waived.

2. **Telegraph Companies—Proximate Cause—Notice of Importance of Message.**

In an action against a telegraph company for its wrongful failure to deliver a message to the wife of the sender informing her that he was in a railroad wreck, but not hurt, it was shown that in fact the sender was hurt in the wreck; that he informed the company's agent at the time the message was sent that he knew his wife would hear of the wreck and spend a miserable night; that the message was not delivered until the next morning, and the wife passed a night of mental anguish, having heard of the wreck of the train on which she expected her husband and not having been able to hear with certainty as to his condition, though she heard that he was hurt: *Held*, (1) the notice given to the agent at the time the message was filed for transmission was sufficient for a recovery of damages against the company for the mental anguish sustained that night by the wife; (2) that the negligence of the company was the proximate cause of the injury.

ACTION heard by *Long, J.*, at December Term, 1907, of JOHNSTON.

This action was brought to recover damages for failing to deliver a telegram, and was heard below on a case agreed, which is as follows:

It is admitted by counsel on both sides that the telegram set out in the complaint was delivered to the agent of the defendant, at Raleigh, N. C., at 7:27 o'clock P. M., 19 May, 1903, and was received by the operator at Smithfield, agent of defendant, at 8:25 P. M. on the same night; that the message was delivered to Mrs. Suttle at 9 o'clock A. M. the

next day, to-wit, 20 May, 1903, and that the business hours of the Western Union Telegraph Company at Smithfield are from 8 A. M. to 8 P. M.

The court, by consent of the parties, found the following facts from the depositions submitted:

1. The plaintiff's husband, J. W. Suttle, left Smithfield on the morning of 19 May to spend the day in Raleigh, expecting to return to Smithfield on the afternoon train, and he so told his wife before leaving home that morning.

2. The plaintiff's husband, J. W. Suttle, did not return to Smithfield on the afternoon of 19 May, because the train on which he was returning to Selma was wrecked, but he returned to Raleigh from the wreck, and at 2:27 P. M. filed with the defendant's agent at Raleigh the telegram set out in the complaint and addressed to his wife, Mrs. J. W. Suttle, Smithfield, N. C., which was as follows: "Esta and I were in wreck; not hurt; will be home to-morrow."

3. In addition to the notice of the importance of the prompt delivery of said telegram appearing from the face of the message, the said J. W. Suttle, at the time of delivering the message, asked the operator if the message would be delivered to his wife that evening, and was told by the operator that it would. J. W. Suttle said to the operator that if he thought it would not reach her that evening he would be compelled to drive home through the country, because he knew his wife would hear of the wreck and would spend a miserable night, not knowing whether he was hurt or not in the wreck.

4. By reason of the failure to deliver the telegram promptly on the evening of 19 May, 1903, the plaintiff, Mrs. Suttle, suffered great mental anguish, as described by her. If the telegram had been promptly delivered upon its receipt at Smithfield, to-wit, 8:30 o'clock P. M., 19 May, 1903, the *feme* plaintiff would not have suffered the mental anguish, as testified to by her.

5. Notwithstanding the facts set out in the telegram, Mr. Suttle did receive certain hurts by the wreck, which are set forth in the evidence.

Upon the admission of counsel for plaintiff and defendant, and the finding of facts by the court, it is considered by the court that the defendant was guilty of negligence in failing to promptly deliver the telegram set out in the complaint to the *feme* plaintiff, and that the plaintiff recover of the defendant the sum of $175, together with the costs of this action, to be taxed by the Clerk.

It was agreed that if the plaintiff is entitled in law to recover, the damages should be assessed at $175.

The defendant excepted to the judgment of the court and appealed.

Pou & Brooks for plaintiff.

R. C. Strong for defendant.

WALKER, J., after stating the case: It is too late now to question the proposition that if a telegraph company receives a message from the sender and undertakes to deliver it to the sendee at a time not within its office hours, it is its legal duty to do so, because of the special undertaking, which constitutes a waiver by it of the benefit of office hours. It may prescribe office hours when they are reasonable, but it may also waive them if it sees fit to do so. *Bright v. Telegraph Co.*, 132 N. C., 317; *Kernodle v. Telegraph Co.*, 141 N. C., 436; *Carter v. Telegraph Co.*, 141 N. C., 374; *Dowdy v. Telegraph Co.*, 124 N. C., 522. In this case the company, by its operator and agent, expressly agreed that the message would be delivered to Mrs. Suttle that evening, and he was specially and fully advised of the importance of a speedy delivery to her. There could hardly be more detailed information of the nature and importance of the message or of the reason why an early delivery to the sendee was desired.

The company was fully aware of the fact that if the delivery of the message was delayed until the next morning the object for sending it would be defeated, and, too, that the sendee, Mrs. Suttle, would suffer mental anguish. The sender informed the operator that he would drive to his home that evening if the message could not be delivered at once, and thereby relieve his wife's anxiety, as she would be sure to hear of the accident; that he expected to return home that afternoon, and his failure to do so, together with the knowledge of the accident by his wife, would be sure to cause her mental distress. The case is a plain one for the application of the rule laid down in the cases cited. Indeed, it is much stronger against the company than were the facts in any one of them.

The defendant's counsel contends that, as the information contained in the message was false, the delayed delivery was not the proximate cause of the injury, and that the meaning or import of the message did not appear on its face and was not communicated to the operator. He reasons from this that the damage to the *feme* plaintiff was not within the contemplation of the company and the plaintiff when they entered into the contract for the transmission of the message. We have held, it is true, that the company must be notified in some way that mental anguish will naturally and reasonably follow as a result of its negligence, and this information must be imparted to it by the contents of the message itself or by facts within its knowledge at the time, or brought to its attention at the time of receiving the message for transmission. *Williams v. Telegraph Co.*, 136 N. C., 82; *Cranford v. Telegraph Co.*, 138 N. C., 162; *Bowers v. Telegraph Co.*, 135 N. C., 504. But in this case the evidence is plenary that the company was fully informed as to the nature of the message, its meaning and import, and could easily have inferred, if it was not directly and explicitly told, what the consequence of delaying the delivery until the next morning would be. It cannot close its mind to the knowledge of facts which are

apparent, and thus plead its own ignorance as an excuse for its failure to deliver the message. If it carelessly disregarded the information it received, and its evident import, its fault in this respect is not to be imputed to the plaintiff, so as to bar her right to damages. The operator was told by Mr. Suttle what his purpose was in sending the message and in asking for a prompt delivery that evening. It was to avoid the very thing that has occurred, and which every reasonable man, mindful of his obligation to others, should have known would occur. The delay of the company was clearly the proximate cause of the injury. The case of *Dayvis v. Telegraph Co.*, 139 N. C., 79, seems to be a direct authority sustaining the ruling of the court. In that case it is said by *Justice Hoke:* "This message was sent to prevent anxiety in the plaintiff's mind, and but for the defendant's default would have fulfilled its mission."

We have carefully examined the objections to the testimony, and find no error in the rulings of the court upon them. They seem to be fully answered by what we have said on the merits of the case.

There is no error in the decision upon the admissions of counsel and the facts found by the court.

Affirmed.

B. F. D. ALBRITTON & CO. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 October, 1908.)

1. **Penalty Statute—Damages—Separable Causes.**
   Actions against a carrier for damages arising from goods damaged or lost while in its possession, and for the penalty for delay of carrier in settlement within sixty days after claim has been filed, etc. (Revisal, sec. 2634), are separable causes.

2. **Penalty Statutes—Failure to Pay Claim—Accepting Payment for Damages—Waiver—Suit for Penalty.**
   The consignee, by accepting from the carrier the full amount claimed as damages to or loss of goods while in its possession, does not waive his right of action to recover the penalty for failure of the carrier to adjust and pay the amount within the time limited after claim has been filed, etc., under Revisal, sec. 2634.

3. **Same — Condition Precedent — Compliance — Interpretation of Statutes.**
   The provision in Revisal, sec. 2634, that the consignee must thereunder recover the full amount of his claim as a condition precedent to his recovering the penalty, is to establish the justness of his claim and the wrongful refusal of the carrier to pay it, and when this is otherwise established by agreement and settlement the meaning and intent of the statute have been met.

ACTION heard before *Neal, J.*, and a jury, at March Term, 1908, of LENOIR.

This action was brought to recover the penalty given by section 2634 of the Revisal for failing to adjust and pay a claim for loss of property shipped over the defendant's road.

B. F. D. Albritton testified that he is a member of the partnership of B. F. D. Albritton & Co., and that J. J. Edwards and J. E. Albritton are the only other partners; that he filed with the agent of the defendant company at Ayden, N. C., on 15 September, 1906, a claim against the defendant for the sum of $25.75 for loss of and damage to goods shipped over the road of defendant; that the claim was not paid, and on 16 October, 1907, action was instituted before W. F. Stanley, justice of the peace, for the amount of the claim, the

summons in said action being returnable on 23 October, 1907; that the action was not tried, but the defendant, after the action was brought, offered to pay to plaintiff the amount claimed, with interest and costs of the action, which was accepted and the action dismissed by a consent judgment on 4 November, 1907, at which time the plaintiffs receipted in full for the claim. The summons and judgment in the previous action and the receipt of plaintiff to defendant were all in evidence.

Upon the evidence of the plaintiffs the Court intimated that they could not recover, whereupon they submitted to a nonsuit and appealed.

Y. T. Ormond for plaintiff.
Rouse & Land for defendant.

WALKER, J., after stating the case: The only question presented in this case is whether the plaintiff is entitled to recover the penalty of $50, given by section 2634 of the Revisal for a failure by a common carrier to adjust and pay a claim for loss of or damage to property entrusted to it for transportation, when the carrier has voluntarily paid the claim in full, after the time limited in the statute for its payment. The section is as follows: "Every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid within sixty days in case of shipments wholly within this State, and within ninety days in case of shipments from without the State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment or point of delivery to another common carrier: *Provided*, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date

of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of $50 for each and every such failure, to be recovered by any consignee aggrieved in any court of competent jurisdiction: *Provided,* that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalty herein provided for, may be united in the same complaint." Revisal, sec. 2634.

It will be observed that the penalty is given for a failure to adjust and pay within sixty days after the claim is filed. The defendant contends that the payment described in the section is one which is enforced by judgment and execution in an action brought to recover the amount of the claim, and that if the carrier pays voluntarily, however long the payment may have been delayed beyond the time fixed by the statute, there is no liability for the penalty. We cannot assent to this construction of the section, for it contravenes its plain meaning. The penalty is given for a failure to adjust and pay within sixty days after the claim is filed, whether the payment is voluntary or not. If it is voluntarily made, no suit is necessary to recover the amount due, but only to recover the penalty, but if it is not made voluntarily the plaintiff can sue for the amount of the claim, and afterwards in a separate action recover the penalty, or, at his election, he may join the two causes of action in one suit. It is to the action in which the two causes are joined that reference is made by the use of the words "unless such consignee recover in such action," the idea being that if the claim has not been previously adjusted and paid, whether voluntarily or involuntarily, then the plaintiff must join the two causes in

one action in order that he may have his right to the full amount claimed by him adjudicated before any judgment is rendered for the penalty, it being necessary to establish that he is entitled to the full amount he claims, as a condition precedent to his right to recover the penalty, if there has been a delay in adjustment and payment. The reason for this is that it must be known first that the plaintiff has not made an excessive demand of the defendant, for if he has, the refusal of the latter to pay would be rightful and the penalty would not accrue. Any other construction would enable the carrier, by its own wrong in refusing to pay a just claim for loss or damage, to compel the plaintiff to sue, and then by settling to avoid the penalty, or by delaying to pay ever so long beyond the time fixed by the statute, and then finally settling, produce the same result. This would be contrary to the plain words of the section and would enable the carrier, by evasion, to defeat the clearly expressed intention of the Legislature.

We were referred by counsel for the defendant to the case of *Best v. Railway*, 72 S. C., 479, which seems to sustain his position, but we are unable to follow that decision. The reasoning of *Justice Gary*, in his dissenting opinion, commends itself most favorably to us, and we concur in what he says, as follows: "The proper construction of the act is that when a common carrier fails to adjust and pay the consignee's claim within the time specified by the act, it subjects itself to liability (1) for the amount of the loss or damage, together with interest thereon from the date of the filing of the claim therefor, until the payment thereof; (2) for a penalty of $50 for failure to adjust and pay the claim within the period prescribed by the statute, provided the consignee recovers the full amount claimed, whether in an action, when necessary, or by voluntary payment on the part of the common carrier. *The mode of determining whether the consignee was entitled to recover the full amount of his claim is a mere incident and not a condition precedent to his right*

to recover the penalty. The adjustment and payment of the claim for loss of the property was not intended as satisfaction of the liability incurred as a penalty, nor did it have such effect by operation of the law."

There is no valid reason for holding that the adjustment and payment of the plaintiff's claim is a waiver of the penalty. If the carrier delays the adjustment and payment of the loss or damage more than sixty days after the claim for the same is filed, the penalty accrues, and the plaintiff is then entitled to recover the amount of his claim, as well as the penalty, and he may do so in one action or in separate suits, the right to the penalty depending upon his recovery of the full amount of his claim. We do not see why the plaintiff should wait until he has recovered the penalty before receiving the amount of his claim, or forfeit the penalty. There is no provision in the statute to that effect. The penalty is given for the delay in adjusting and *paying,* and it cannot, therefore, be that paying after the time fixed by the statute works a forfeiture of the penalty.

It was contended that the receipt of the amount of the claim is a waiver of the penalty, because the plaintiff can have but one recovery for the claim and penalty, there being but one wrong, and the case of *Eller v. Railroad,* 140 N. C., 140, was cited in support of the contention, but the case is not applicable. Here there are two separable causes of action—one for the claim and the other for the penalty—while in *Eller's case* there was but one wrong for which the plaintiff was entitled to recover only damages, which were necessarily indivisible. We held that he must recover all his damages in one action, as there was but one cause of action for the one wrong, and for the reason that there could be only one compensation for the single wrong or breach of duty. The distinction between the two cases seems to be clear.

There was error in the ruling of the court. The nonsuit is set aside and a new trial ordered.

New Trial.

CORNELIUS STATON v. L. L. STATON.

(Filed 21 October, 1908.)

1. Water and Water Courses—Drainage of Lands—Supplemental Proceedings—Motion in the Cause.

When the rights and duties of adjoining landowners as to drainage in a certain canal have been determined under the Drainage Act (now Revisal, ch. 88), and judgment entered, proceedings subsequently brought for the purpose of readjustment, owing to change of ownership and partition, etc., are in effect a motion in the cause, in which the judgment, unlike a final judgment, is not conclusive; and the cause can be brought forward from time to time, upon notice to the parties, and further decrees made to conform to the exigencies and changes which may arise.

2. Water and Water Courses—Drainage of Lands—Petition—Description—Pleadings—Amendments.

A petition in proceedings brought for the purpose of readjusting the rights and duties of adjoining landowners in draining their lands into a certain canal is not uncertain because it does not restate the *termini* of the canal which sufficiently appear in the original proceedings; and, if otherwise, the petitioner should be allowed to amend.

ACTION heard by *Lyon, J.*, at April Term, 1908, of EDGECOMBE.

Plaintiff appealed.

G. M. T. Fountain for plaintiff.

W. W. Clark and *H. A. Gilliam* for defendants.

CLARK, C. J. The plaintiff herein instituted a proceeding in 1885, under the Drainage Act (now Revisal, ch. 88), for the right to drain into Barnes Canal. Commissioners were appointed, the rights and duties of the several parties determined and the amount each should pay assessed. The report was confirmed 30 January, 1886. This is a subsidiary proceeding begun in the Clerk's court, which sets out that repairs to the canal are needed, that some of the tracts have changed hands and that one tract in particular has been

partitioned, and asking that the amount assessed against that tract be divided and assessed in proper proportions against each of the partitioners.

This is in effect a motion in the cause. From the nature of the proceeding, the judgment in 1886 is not a final judgment, conclusive of the rights of the parties for all time, as in a litigated matter. But it is a proceeding *in rem,* which can be brought forward from time to time, upon notice to all the parties to be affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which a former tract has been divided by partition or by sale; to amend the assessments, when for any cause the amount previously assessed should be increased or diminished, for repairs; for enlarging and deepening the canal or for other purposes, or to extend the canal and bring in other parties. It is a flexible proceeding, and to be modified and moulded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in the control of the court.

It is not necessary, however, to keep such cases on the docket, but they can be brought forward from time to time, upon notice to the parties, upon supplementary petition filed therein, and further decrees made to conform to the exigencies and changes which may arise.

There is no uncertainty in not restating in this petition the *termini* of the canal. That sufficiently appears in the original proceeding, and if it did not the petitioner should be allowed to amend. *Porter v. Armstrong,* 134 N. C., 449; *s. c.,* 138 N. C., 179.

These proceedings are not highly technical, but are intended to be inexpensive and to be moulded from time to time, by the orders of the court, as may best promote the beneficial results contemplated by the statute. The judgment dismissing the proceeding is

Reversed.

R. E. AND C. E. MASON v. A. E. NELSON COTTON COMPANY AND W. A. TRICE ET AL.

(Filed 21 October, 1908.)

1. Negotiable Instruments—Consignor and Consignee—Draft, Bill of Lading Attached — Holder in Due Course — Original Contract, Liability of Holder on.

One who has discounted a draft in due course, made for the purchase price of goods, with bill of lading attached, and assigned to him as security to the draft, is not liable on that account for a breach of warranty in a contract between the consignor and consignee respecting the quality of the goods, the subject of the bill of lading.

2. Same—Rights of Holder in Due Course—Strangers—Notice.

By discounting a draft with bill of lading attached, and assigned as security, the holder has an interest in the goods, the subject of the bill of lading, only to the extent sufficient to protect his claim; and when the consignee accepts and pays the draft and receives the goods from the carrier on presentation of the bill of lading, without being permitted by the carrier to examine them, he does so in recognition of the holder's rights, and the holder is not liable upon a breach of warranty of contract between the original parties, to which he was a stranger, in the absence of evidence that he had notice thereof.

3. Negotiable Instruments—Drafts, Acceptance of—Rights of Holder in Due Course—Contracts—Consignor and Consignee.

After a draft for the purchase price of goods, with bill of lading attached, has been accepted by the drawee, the amount previously paid therefor by a holder in due course becomes a new and binding consideration, giving such holder a position superior to the original contract rights between the consignor and consignee, and to any defenses existent between them.

4. Stare Decisis—Rule of Property—Uniformity of Decisions—Commercial Law.

While the doctrine of *stare decisis* is one of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents, and the courts will adhere to a decision, found to be erroneous, when it has been acquiesced in for so great a length of time as to become accepted law, constituting a rule of property, it should not be extended and applied to a decision which is clearly erroneous and which injuriously affects a general business law.

5. Same—Decision Overruled—Retrospective Effect.

A decision of a court of supreme jurisdiction overruling a former decision is as a rule retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was law; and this principle should apply to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods.

CLARK, C. J., dissenting *arguendo.*

ACTION heard on demurrer to complaint, before *Ward, J.*, at Fall Term, 1907, of MECKLENBURG.

The facts stated in the complaint, considered material to a proper understanding of the cause, are:

1. That in August, 1906, defendant A. E. Nelson, doing a cotton business in Texas, contracted to sell and deliver to plaintiff, resident and doing business in Charlotte, N. C., fifty bales of cotton, at the price of 8¾ cents per pound, and guaranteed that said cotton, in grade, texture and quality, was according to samples exhibited.

2. That on 6 August, 1906, the said defendant A. E. Nelson, in pursuance of said contract, delivered at Houston, Tex., fifty bales of cotton, marked "L. O. N. G.," to the Texas and New Orleans Railroad Company, a common carrier, and took and received from said railroad company a bill of lading therefor in the usual form, stipulating that said cotton was deliverable to the order of the said A. E. Nelson at Charlotte, N. C., with instruction to notify plaintiffs, R. E. and C. E. Mason, upon its arrival at said point; and thereafter, upon the same day, the said Nelson drew his draft for the said sum of $2,176.14, the price agreed to be paid for the said cotton, upon the plaintiffs, payable to the order of one W. A. Trice, and attached to the said draft, as security for the payment of same, the aforesaid bill of lading, and thereupon endorsed the said bill of lading, and sold, assigned and transferred the same to the defendant Trice for full value, and the said Trice thereby became the owner of the cotton described in and covered by said bill of lading.

6. That thereafter the said Trice endorsed the said draft and bill of lading to T. W. House, banker, of Houston, Tex., for collection, who forwarded the same to the First National Bank of Charlotte, N. C., for a like purpose.

7. That plaintiffs were unable to get said cotton from the railroad company, when it arrived in Charlotte, without presenting the bill of lading therefor, and plaintiffs were compelled to pay said draft before they could get said bill of lading and examine said cotton to ascertain whether or not said cotton was of the same grade, texture and type contracted for; and plaintiffs, relying on the representations and guarantee of said A. E. Nelson that said cotton was of the same grade and type as the "E. V. A." samples, paid said draft to the First National Bank of Charlotte, N. C., to-wit, $2,176.14, and took up and surrendered the bill of lading to the Southern Railway Company and took into their possession the said fifty bales of cotton.

8. That immediately or as soon thereafter as practicable plaintiffs examined said cotton and found that said cotton was not of the same grade as the "E. V. A." samples, in type or texture; on the contrary, said cotton was much inferior to said samples, in grade and texture and type, and was what is known as threshed cotton, worth in the market a little more than one-half the value of cotton of the grade and texture of said "E. V. A." samples, although said defendant A. E. Nelson had represented and guaranteed to plaintiffs that said fifty bales should be the same grade, type and texture as said "E. V. A." samples.

9. That by reason of the low grade and texture and inferior quality of said cotton, plaintiffs were compelled to sell said cotton at a great loss, and were put to great expense in storing and reselling said cotton.

10. That by reason of the failure of said cotton to be of the same grade, texture and type as the "E. V. A." samples, as defendant A. E. Nelson represented, warranted and

guaranteed it to be, and by reason of the breach of the warranty and the expense incurred by reason of such breach, and failure of said cotton to come up to the grade, texture and type of the "E. V. A." samples, plaintiffs have been damaged in the sum of $1,795.62.

11. That plaintiffs are informed and believe, and are so advised, that by reason of the assignment of said bill of lading by the endorsement of said A. E. Nelson to W. A. Trice, and the endorsement of said draft by said W. A. Trice, and the assignment of said draft and bill of lading to said House, and by the endorsement of said draft and bill of lading by said House, banker (unincorporated), and the payment of same by these plaintiffs, said W. A. Trice became liable to plaintiffs for all damages they have sustained by reason of the failure of said cotton to come up to the grade, texture, and type guaranteed to plaintiffs by said A. E. Nelson, as hereinbefore set out.

12. That plaintiffs have demanded payment from the defendants, and payment has been refused.

Defendant W. A. Trice demurred to said complaint, for "that same does not set" forth any fact whereby this defendant became liable to the plaintiffs, and it appears in and by said complaint that said W. A. Trice is in no way liable to account for the alleged breach of contract set out against his said codefendants.

There was judgment overruling the demurrer and allowing said defendant to answer over, whereupon he excepted and appealed.

Burwell & Cansler and *W. F. Harding* for plaintiffs.
Tillett & Guthrie and *W. A. Trice* for defendants.

HOKE, J., after stating the case: In the case of *Finch v. Gregg*, reported in 126 N. C., 176, this Court held in effect that when a purchaser and consignee of goods has accepted and paid a draft drawn on himself by the consignor for the

purchase price to a holder of the draft, "in due course," said holder, having taken an assignment of the bill of lading, attached or otherwise, as security for the amount paid in obtaining the draft, and this bill of lading is turned over to the consignee on the payment of the draft, who thereby obtains possession of the goods, the said consignee can recover of the holder receiving such payment damages for breach of warranty given by the consignor in the original contract of sale; and this, though the holder of the draft had no interest *ultra* in the goods and took no part in the bargain. The present writer, who presided at the trial of *Finch v. Gregg* in the Superior Court, first made this ruling in the court below, following with much hesitation a decision of the Texas Court of Civil Appeals, then recently made (*Landa v. Lattin Bros.*, 19 Texas Civil Appeals, 246), and the position was sustained on appeal. The purport of this Texas decision, cited with approval in the opinion of our Supreme Court, on the question chiefly considered here is thus stated in Southwestern Reporter, Vol. 46, p. 48:

"1. A consignor of wheat delivered to a bank a bill of lading, with draft, drawn upon his consignee, attached. The bank cashed the draft and paid the consignor. The consignor had contracted to furnish sound wheat, but the wheat furnished was of inferior quality: *Held*, that the bank purchasing the bill of lading became the owner of the wheat and was responsible to the consignee for the failure to furnish sound wheat.

"3. A bank cashing a draft attached to a bill of lading drawn on the consignee of goods becomes a purchaser of the goods, and must at its peril exercise care to see that the goods are of the quality that the consignor contracted to furnish."

These cases, and the principle upon which they are made to rest, apply to the facts presented here, and if they are to be regarded as the law governing the rights of these parties the judgment of the Court below overruling the demurrer

must be affirmed. Trice, the appellant who demurred to the complaint, was the holder of the draft, in due course, with a bill of lading attached and assigned to him as security for the amount paid in discounting the draft. So far as appears, he had no interest in the goods, except what belonged to him by reason of these papers, took no part in the bargain and sale and had no knowledge or notice of its terms, and he is sued by the consignee, who accepted and paid the draft, for breach of warranty given by the consignor to the consignee in the contract of sale. After giving the question our best consideration, with a due sense of the great importance of adhering to decisions when formally announced as law by the Court, we feel constrained to overrule the case of *Finch v. Gregg*, being of opinion that the decision is based on an erroneous principle, or rather on the erroneous and unwarranted extension and application of an admitted principle, and is contrary to the great weight of well-considered authority. The case excited much comment at the time it was announced, was the subject of adverse criticism in a learned and intelligent note by the editor of L. R. A., in Vol. 49, p. 679, and the principle upon which it was made to rest was likewise condemned in a well-considered and instructive note to the case of *Hall v. Keller*, 91 Am. St. Rep., p. 209, the case being taken from 64 Kansas, 211. Another comment of like purport will be found in a note to an Alabama case of *Haas v. The Citizens Bank of Dyersburg*, 6 L. R. A. (U. S.), 242, citing additional authorities in support of the editor's position.

The opinion in *Finch v. Gregg*, delivered by our Supreme Court at February Term, 1900, was referred to at the same term in *Sloan v. Railroad*, 126 N. C., 487, as announcing a correct principle of law, and again at Fall Term, 1902, in the case of *Perry v. Bank*, 131 N. C., 117; in this last case only to say that it had no application to the cause then being

considered; and with these two exceptions, so far as the writer can discover, no other reference was made to the case until Fall Term, 1903, in *Manufacturing Co. v. Tierney*, 133 N. C., 630, when it was cited in the opinion in support of this principle: "It is well settled that when the vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order, and thereupon draws a draft payable to his own order upon the vendee, attaching the bill of lading, and endorses to a third party such draft for value, the title to the goods vests in the endorsee, at least to the extent of the amount advanced. Daniel on Neg. Instruments, sec. 1734 (a). The law is thus stated and cited with approval by Mr. Daniel: 'When the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and intending to resume the right of control over them, at the same time drawing upon the purchaser for the price and delivering the bill of exchange, with the bill of lading attached, to an endorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor.' *Emery v. Irving Bank*, 25 Ohio St., 360; 18 Am. Rep., 299; *Bows v. Ex. Bank*, 91 U. S., 618. This Court, in *Finch v. Gregg*, 126 N. C., 176 (49 L. R. A., 679), recognized this almost elementary principle, carrying it to its fullest extent."

To the extent indicated in this citation from *Manufacturing Co. v. Tierney* the principle contained in *Finch v. Gregg* is sound. The holder of a draft or bill of exchange, who takes an attached bill of lading by assignment or otherwise as security for the amount advanced on the draft, does become the owner of the goods as against the acceptor to an extent sufficient to secure and protect his claim. And it is in extending this wholesome and very generally accepted principle of mercantile law to an unwarranted length that the error in

Finch v. Gregg consists. That decision not only makes the holder of a negotiable instrument, who has taken an assignment of the bill of lading only as security, the owner outright of the goods, but imposes on him the burden and obligation of a contract concerning the property made between the consignor and consignee in which the holder took no part and of which he had no notice. And in no aspect of the matter, as we view it, can such a position be sustained. Since the noted case of *Lickbarrow v. Mason,* Smith's Leading Cases, 9 Am. Ed., p. 1045, and before that time it has been accepted doctrine that the holder of a bill of lading by assignment will under certain conditions be regarded as the absolute owner of the goods; but, as pointed out by the American Annotator of this decision in Law Library Ed., Vol. 43, p. 543, this is only true when by the terms of the contract between the assignor and the assignee the entire title was to pass to the assignee. That decision was made on a question not at all relevant to this inquiry, and is therefore not further pursued; but there is nothing in the case or the principle therein announced which prevents the assignee, when the contract so provides, from taking a restricted interest under such an assignment, and of having his rights protected and enforced according to the stipulations of his contract. And, so far as we can discover, until these decisions were made which we are now reviewing, it was a doctrine universally recognized that the holder of a negotiable instrument with bill of lading attached, under the circumstances indicated, was by right superior to that of a consignee who had accepted and paid a draft drawn on him for the purchase price of the goods; and whether such consignee accepted and paid, as in this case, or paid the draft on presentation, as in *Finch's case*, the result was the same. In either event the consignee thereby took a position in recognition of the holder's rights under his contract, whatever they were.

In accordance with this doctrine, the case of *Manufacturing Co. v. Tierney, supra,* correctly holds: "4. Where a bank, for a valuable consideration, takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor."

This principle is entirely inconsistent with the doctrine announced in *Finch v. Gregg,* and, as stated, is in accord with the general current of authority on the question in this country and in England. *Robinson & Cherry v. Reynolds,* 42 E. C. L., 634; *Hoffman & Co. v. Bank,* 79 U. S., 181; *Goltz v. Bank,* 119 U. S., 551; *Blaidsell v. Bank,* 96 Tex., 626; *Arpin v. Owens,* 140 Mass., 144; *Tolerton & Stetson Co. v. Bank,* 108 Iowa, 217 (50 L. R. A., 777); *Lewis v. Small Co. et al.,* 117 Tenn., 153 (6 L. R. A., N. S., 887); *Hall v. Keller,* 61 Kan., 211 (91 Am. St. R., 209), with a large number of additional authorities applying the same principle cited in the notes above referred to. *Finch v. Gregg,* 49 L. R. A., 679; *Tolerton's case,* 50 L. R. A., 777; *Haas' case,* 1 L. R. A., N. S., 242; *Hall's case, supra,* 91 Am. St. R., 209.

In *Robinson's case, supra, Tindal, C. J.,* for the Court, said: "The sole ground on which the defendant relies is that the acceptance was not binding on account of the total failure or insufficiency of the consideration for which it was given, the document on the delivery of which the acceptance was given having been forged and there never having been any other consideration whatsoever for the acceptance of the defendants. And this would have been a good answer to the action if the bank had been the drawer of the bill. But the bank is endorsee, and endorsee for value, and the failure or want of consideration between it and the acceptors constitutes no defense, nor would the want of consideration between the drawer and acceptors (which must be considered as

included in the general averment that there was no consideration), unless they took the bill with notice of the want of consideration, which is not averred in this plea."

The exact case is presented in *Tolerton's case, supra,* where it is held: "(1) The purchaser of a draft with bill of lading attached is not liable on a warranty made by his assignor of the goods represented by the bill of lading. (2) Payment by the drawee to the payee of a negotiable draft with bill of lading attached cannot be recovered back by the drawee on the ground that the payee has received money which it cannot equitably retain because of a breach of warranty made by the drawer to the drawee on the sale of the goods for which the bill of lading was given, since any equities arising therefrom do not affect the payee when he has secured an acceptance or payment."

In *Hoffman's case, supra,* it was held: "A consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts: *Held,* that there was no recourse by the consignee against the bank."

And the doctrine, and the reason upon which it rests, is well stated in the opinion, as follows: "Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payee or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. Different rules apply between the immediate parties to a bill of exchange, as between the drawer and the acceptor, or between the payee and the

drawer, as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of the fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title; and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where, if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff."

The opposing principle that maintained in *Finch v. Gregg* is not only contrary to this great array of well-considered authority, but is against the real facts of the transaction, bringing the holder of a negotiable instrument under the burdens of a contract which he never made, and in which, so far as appears, he had no interest. The allegations in the complaint, made by the plaintiff himself and admitted by the demurrer, are to the effect that one Nelson, of the Nelson Cotton Company, sold the cotton to plaintiff. He or one of them owned the cotton, made the bargain, gave the warranty and got all the profits, if there were any.

Trice, the defendant and payee, took the draft for full value in the regular course of mercantile dealing, and, as heretobefore stated, so far as the facts show, he had no interest in the cotton, took no part whatever in the bargain and had no knowledge or notice of its terms. He simply received what was due him under his contract, and, this being true, it would be a hard measure of justice to hold him responsible for the assurances and stipulations given by the vendor to the purchaser in the contract between them from which he derived no benefit. This case of *Finch v. Gregg* and the two or three others of like import profess to find support in *Dows v. Bank*, 91 U. S., 618, and *Bank v. White*, 64 Mo. Appeal Reports, p. 677, but neither of these decisions is authority for their position. In *Dows v. Bank* the precise question we are now discussing was not presented, but the case in its principal feature held that where a bank had discounted a draft in due course for the purchase price of certain wheat, and had taken bills of lading as security for the amount, these bills making the wheat deliverable on account of the cashier of a correspondent bank, the bank discounting the draft (holder of the same in due course) would be the owner of the wheat to the extent necessary to protect its claim, and could recover the same from one who had purchased the wheat from the drawee of the draft, to whom it had been delivered, but who had received it as warehouseman, subject to instructions not to deliver till the drafts were paid. The drawee of the draft had neither accepted the same nor paid it on presentation, and the question was simply one of title between the bank, the holder of the draft with bill of lading attached, and the purchaser from the drawee, who had received the wheat as warehouseman, with instructions not to deliver; and the rights and obligations of the respective parties after acceptance or payment of the draft by the drawee were in no way considered. So far as this decision bears on the question, it favors defendant's position in hold-

ing, as it does, that a person discounting a draft in due course for the purchase price of goods, and taking a bill of lading attached as security, can enforce his claim according to the terms of his contract. The case on this point being properly digested as follows: "2. A party discounting a draft and receiving therewith, deliverable to his order, a bill of lading of the goods, against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft."

In the Missouri case, the bank having discounted a draft of a lumber company for the price of certain shingles, with bill of lading attached, and assigned to the bank as security for the amount, sued one White, a lumber dealer and drawee of the draft, to whom the shingles had been consigned for sale at a certain price. White, the consignee and defendant, had taken the shingles from the carrier, paying a freight bill thereon to the amount of $134.61, and, finding the shingles were off grade and not salable at the stipulated price, immediately notified the consignor, requesting that he take the shingles and reimburse him for the amount of his costs and charges or the shingles would be sold for that purpose. No attention being paid to this request, White sold the shingles, realizing the market value, reimbursed himself for the amount he was wrongfully out of pocket, and remitted the balance of $40 to the consignee and original owner. The bank sued for the entire amount of the draft, and the Court of Appeals, in holding that the defense was available against plaintiff's demand, said: "From that time on plaintiff occupied the same relation towards the shingles then in transit that the lumber company did before the bill of lading was transferred. The assignment of the bill of lading operated as a symbolic delivery of the property covered by it. However, the rights of White, the consignee, were not impaired or disturbed by this change of ownership in the property.

He was left with the same defense as against the plaintiff bank that he would have as against the lumber company," etc.

It will be noticed here that White, the consignee, had not accepted or paid the draft drawn on him and discounted by the bank, and this distinction serves to indicate and emphasize the error in the cases we are reviewing. Until White, the drawee, had accepted the draft or acknowledged his obligation thereon by paying the same, he was only bound by the terms of the original contract, and that was the only consideration moving against him; and the discounting bank, having to assert its demand under and by virtue of the original contract of the consignor, must take his position in the transaction and be subject to the defenses available against him. But on acceptance of the draft the owner comes under a different obligation, and the amount paid by the bank for the draft becomes a new and binding consideration, giving the bank, when a holder in due course, a position superior to the original contract between the consignor and consignee, and to any defenses existent as between them.

So far as we are now aware, the first case notably making erroneous application of these two authorities was that of *Landa v. Lattin Bros. et al.,* decided by the Texas Court of Civil Appeals, in June, 1898, and reported in 19 Tex. Civil Appeals, p. 246. That decision held, as stated, that the purchaser of goods and drawee of draft for purchase price, who pays same on presentation, may recover for breach of contract stipulations made by the vendor against one who has become the owner of the draft in due course, with bill of lading attached and assigned as security for the amount paid in obtaining the draft. A conclusion drawn from the position maintained in this and other cases holding the same view, that the holder, in taking the assignment of the bill of lading as security, becomes the owner outright of the goods and responsible for the stipulations of the bargainor given in the

original contract of sale, a position which we have endeavored to show cannot be sustained in reason or authority. The decision has since been disapproved by the Supreme Court of Texas, in an opinion delivered in June, 1903 (*Blaidsell Co. v. National Bank,* 96 Tex., 627), and is no longer recognized as authority in that State.

The Supreme Court of Mississippi has rendered a decision similar to that of *Landa v. Lattin Bros.*, in *Searles Bros. v. Smith Grain Co.*, reported in 80 Miss., 688. The opinion in this case, however, simply adopts the reasoning of the Court in *Landa v. Lattin Bros.*, embodying the opinion in that case as its own deliverance on the subject, and in itself adds nothing to the discussion and affords the position maintained no additional weight, except that which arises from the sanction and approval of that learned and usually sane and safe Court.

Another case sustaining the position announced in *Landa v. Lattin Bros.* is that of *Haas v. The Bank*, 144 Ala., 562. The decision reported also in 1 L. R. A., N. S., 242, where it is subjected to adverse comment in a note by the editor, proceeds on the theory that the holder, in taking over the draft with bill of lading attached, without proof *ultra*, thereby became the owner outright of the goods and of the contract of sale, and by delivering the bill of lading on payment of the draft he came under all the obligations of the original parties to the contract of sale. The Judge delivering the opinion states the position as follows: "And when, as here, the defendant became the owner of the debt and the goods, and assuming necessarily the responsibility and burden of delivering them to the plaintiffs, it became the seller in fact, and must bear the burden of the transaction. In short, the defendant took the contract of Klyce, the shipper, and stood in his shoes with the same rights—no greater, no less."

There is doubt if the Court intended in strictness to apply the principle stated to a case like that presented here, for in our case it is stated expressly that the appellant took the bill of "lading as security," but on the facts suggested in the opinion we do not think the decision of *Haas v. Bank* can be sustained, proceeding as it does on the assumption, without proof, that the bank on discounting the draft with bill of lading attached became the owner of the original contract of sale.

As we have held in *Furniture Co. v. Express Co.*, 144 N. C., 642, "A court will take judicial notice of the general business methods of railways and other well-known and *quasi* public corporations when these methods are universally practiced and commonly known to exist, and to the extent that such methods are sufficiently notorious to make their assumption safe and proper." And we think it an erroneous position to hold or assume that a bank, in discounting a draft for purchase price of goods, with bill of lading attached, took over or intended to take over the original contract of sale or to come under its burdens. On the contrary, we may safely assume, when there is no proof to the contrary, that no such intent existed, and that the bank simply discounted a draft according to the ordinary methods of mercantile dealing. It held it, and had a right to hold it, by reason of the consideration moving from itself to the drawer, and when the drawee accepted or paid the draft, on presentation, he did so in recognition of the bank's position.

It is earnestly contended that the appellant in the present case comes under the obligation of the contract of sale, because the plaintiff was compelled to pay the draft before he could make examination of the cotton—that he was forced to take the cotton "unsight unseen." There is doubt if any such allegation is made against the appellant. In this connection the complaint states "that plaintiffs were unable to get said cotton from the railroad company, when it arrived at

Charlotte, without presenting a bill of lading therefor, and plaintiffs were compelled to pay said draft before they could get said bill of lading and examine said cotton to ascertain," etc.

The allegation here seems to be against the carrier, and we have held in *Sloan v. Railroad,* 126 N. C., 487, that a common carrier, under certain circumstances, may permit a consignee to inspect goods without subjecting itself to liability; but if it be conceded that no such right existed here, and that the refusal was imputable to Trice, the appellant, he had the right to stand on the integrity of his own contract and hold the goods as owner till his draft was paid. As heretofore stated, by reason of the consideration moving from himself, as purchaser of the draft, his position was superior to that of the drawee, and he had the contract right to insist that the drawee should recognize this position before delivering to him the bill of lading.

Even on grounds of expediency, if such considerations should have place in a discussion of this character, the weight of the argument is against the plaintiff. The utmost that can be urged by plaintiff against the doctrine we apply in denial of his claim is that, by negotiation of the draft, at times colorable, he may be forced to seek redress for his wrong in a distant forum, and that his recovery may on occasions be restricted to a vendor who is insolvent. But these general laws of business, established to facilitate and promote enlightened commercial intercourse, are framed, and properly framed, on the assumption that men will act honestly, and as a rule they do. The few cases that are brought before the courts for decision are exceedingly small in proportion to the immense volume of business that is carried on and satisfactorily adjusted between the parties. And one of these rules universally recognized as well fitted for its purpose should not be interfered with nor have its usefulness seriously impaired because in rare and exceptional instances a wrong may be

possible. And it must be borne in mind that the plaintiff is left without interference to assert his demand against the original vendor, the man with whom he had elected to deal.

Speaking to this question, in the case of *Hall v. Keller,* 64 Kan., 211, *Smith, J.,* delivering the opinion of the Court, said: "To fix a liability upon the bank or upon Keller & Dean, under the circumstances of the present case, would not only violate well-settled rules of the law governing commercial paper, but would also tend to decrease the immense volume of business which is carried on by shippers of stock, grain and other commodities by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks in whose favor such bills are drawn are made liable for damages on account of the defective quality of the property shipped and covered by the bill of lading, or for failure of title in the drawer of the draft, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned. To hold with the plaintiff in error would, to use the language of the author of the note in *Finch v. Gregg,* 49 L. R. A., 679, 'undoubtedly cause a revolution in commercial circles.'"

We are not insensible to the great importance of the doctrine of *stare decisis,* a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time, so as to become accepted law, constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied, but none of them require or permit that a court should adhere to a decision, found to be clearly erroneous, which affects injuriously a general business law, and under the circumstances indicated here. As it has been well said,

"Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue, if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be a grievous mistake to allow more harm than good to come from it." 26 Am. and Eng. (2d Ed.), p. 184. This decision, announced something like ten years ago, cited, not more than twice, as direct authority for the position it contains, and disapproved in the State where it seems to have originated, commented on adversely by the intelligent annotators and reviewers of the country, and pronounced unsound by the great weight of authority bearing on the question, cannot be considered to have ever been acquiesced in or to have become the accepted law of the land. Nor are we inadvertent to the fact that this contract was made at a time when *Finch v. Gregg* expressed the rule which prevailed with us on the question presented, but we are of opinion that this should not be allowed to affect the result.

The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is restrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. *Center School Township v. State ex rel.*, 150 Ind., 168; *Stockton, Trustee, v. Manufacturing Co.*, 22 N. J. Eq., 56; *Storrie v. Cortes and wife*, 90 Tex., 283. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. *Hill v. Railroad*, 143 N. C., 539; *Gelpcke*

v. City of Dubuque, 68 U. S., 175; *City of Sedalia v. George A. Gold,* 91 Mo. App., 32. And there is high authority for the position that this is the only exception that should be allowed. *Falconer v. Simmons,* 51 W. Va., 172. And while this Court, in a case of unusual hardship, has extended the principle of this exception to a criminal cause, in *State v. Bell,* 136 N. C., 674—a cause it will be noted, arising on the construction of a statute—and, in another decision, to a case where a title to real estate had vested (*Hill v. Brown,* 144 N. C., 117), the principle should certainly not be further extended and applied to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods. We are of opinion, therefore, that the case of *Finch v. Gregg* should be overruled and the principle upon which it rests disapproved:

1. As contrary to the general current of authority on a subject where uniformity of decision is so greatly to be desired.

2. Because it puts an undesirable and injurious clog upon commercial intercourse between different sections of the country.

3. Because it may, and frequently does, work grievous wrong to parties litigant, in subjecting them to the burdens and obligations of contracts which they never made, and holding them responsible for fraud and wrongs which they did not commit and of which they had no knowledge or notice.

And from this it follows that the judgment overruling the demurrer of the defendant Trice should be reversed, and on the facts stated in the complaint said demurrer should be sustained.

Reversed.

CLARK, C. J., dissenting: The complaint alleges that the defendant Nelson, in Texas, contracted to sell the plaintiff fifty bales of cotton, of a certain grade and quality, at a certain price, and shipped said fifty bales to plaintiff, taking a bill of lading to deliver same to his own (Nelson's) order in Charlotte, N. C. He drew a draft upon plaintiff for the purchase price, payable to defendant Trice, attached the bill of lading thereto, and delivered them for value to said Trice, who endorsed the draft and forwarded it to his correspondent in Charlotte for collection, with instructions not to deliver the bill of lading to plaintiff till the draft was paid. Upon arrival of the cotton the plaintiff was not allowed to examine or inspect the same till the draft was paid. When plaintiff did receive the cotton, and examined it, he found that it was very inferior to the grade and quality of cotton he had contracted and paid for—so much so that he avers a loss of $1,795.62—and he brings this action to recover back said sum from Nelson and Trice. The latter demurs to the complaint, on the ground that it states no cause of action against him, and appeals from the judgment overruling the demurrer.

If Nelson had given Trice a simple draft upon the plaintiff, and the latter had paid the same, he could not have recovered anything back. It would have been his own fault. But defendant Trice was not satisfied with a draft. He took an assignment of the bill of lading, taking thus to himself the title and the possession of the cotton. He did this to secure himself. He would not permit the plaintiff to receive or even examine the cotton till he had paid the draft. He thus in effect represented to the plaintiff that the cotton was as contracted for, and worth, on the basis of the contract, the amount of the draft.

It is a bad rule that will not work both ways. If the assignee of the bill of lading acquires the title and possession to protect himself against nonpayment of the draft, the

drawee, who is not given the opportunity to examine and reject the cotton, is entitled to recover any sum he pays in excess of the contract price, if there is shortage either in the quantity or quality of the goods. This is fair and just to both sides. It gives the same protection to both. If Trice had permitted the plaintiff to examine the cotton before accepting it, there could have been no complaint. But having compelled the plaintiff to take the cotton "unsight, unseen," under risk of suit for damages if he refused, there was an implied representation, in all fairness, that the cotton was such as was contracted for, and for the price of which Trice was paid. There should be no unjust advantage given to the payee of a draft over the drawee because the payee has an assignment of the bill of lading. If the seller had brought the cotton into town on his wagon, to deliver in accordance with a previous contract, he could not require payment until the cotton had been examined and it was ascertained that it came up to the contract, and, had he so exacted, certainly the seller would be liable for the deficiency in quantity and in quality.

When the cotton is sent by railroad instead of by wagon, and instead of the seller the holder of the bill of lading has the title and possession, and refuses to deliver unless payment is made without inspection, the relation and rights of the parties are the same.

Consignees are entitled to a "fair deal" as well as the payees of drafts secured by assignment of bills of lading. The latter has the security of title and possession of the goods. The consignees are entitled to inspection of goods before payment of draft, and if that is refused and they are forced to pay under penalty of sale or reshipment of goods and protest of the draft, then the payee of the draft is bound to make good the quality and quantity as per the contract for which the draft is drawn.

This same point was before this Court and, after able and elaborate argument, was decided as above by a unanimous Court. *Finch v. Gregg,* 126 N. C., 176. Exactly the same ruling was made in *Grocery Co. v. Bank,* 144 Ala., 562; *Searles v. Grain Co.,* 80 Miss., 688; *Landa v. Lattin,* 19 Tex. Civ. App., 246; though the last-named case has since been reversed in Texas.

In *Bank v. Bank,* 91 U. S., 98, *Mr. Justice Strong* says: "That the holder of a bill of lading, who has become such by endorsement and by discounting the draft drawn against the consigned property, *succeeds to the situation of the shipper* is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holders. Bills of lading that are transferable by endorsement are only *quasi* negotiable. The endorsee does not acquire a right to change the agreement between the shipper and his sendee. He cannot impose obligations or *deny advantages* to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor."

Bank v. White, 65 Missouri App., 679, was a case where a manufacturer of lumber and shingles sold and shipped to a dealer a car load of shingles and at the same time drew a draft on the purchaser, with a bill of lading attached, and assigned the same to the plaintiff, the banking company. When the shingles arrived they were found to be of inferior quality, and the purchaser refused to pay the draft. Thereupon the bank sued the purchaser for the entire amount of the draft, and the purchaser interposed his defense. The Court, in supporting the contention of the defendant, says: "We can discover no prejudicial error in the trial of this case, and since, too, substantial justice has been done, the judgment will not be disturbed. Plaintiff's counsel are right in the contention that when the bank took an assignment of

the draft and bill of lading from the lumber company, whether as an absolute purchase or collateral security, it became vested with the title to the property. From that time on, plaintiff occupied the same relation towards the shingles then in transit that the lumber company did before the bill of lading was transferred. The assignment of the bill of lading operated as a symbolical delivery of the property covered by it. However, the rights of the consignee were not impaired or disturbed by the change of the ownership in the property. He was left with the same defense as against the bank that he would have had as against the lumber company."

In *Haas v. Bank*, 144 Ala., 562, a shipper consigned goods in his own name, having the bill of lading made out to himself, and assigned the bill, accompanied by draft on the buyer, to a bank to which the draft was made payable, and which paid the seller for the goods. In that case it was held that the bank became the absolute owner of the goods and of the debt due from the buyer, and, on constructively delivering the goods to the buyer by an assignment of a bill of lading and the acceptance and payment of the draft by the buyer, became liable to him to the same extent as the seller would have been, but for the assignment, for any shortage in the goods. On page 131 the Court said: "In short, the defendant took the contract of the shipper and stood in his shoes, with the same rights—no greater, no less; and the payment of the draft by plaintiffs, who were consignees, which merely evidence the price to be paid for the goods, could no more shield or protect the defendant bank from liability than its payment would have protected the shipper had he undertaken a delivery of the goods and received the purchase price for them. It would be an anomaly to hold that the defendant is protected as purchaser of the account and bill of lading because the plaintiffs paid the draft, which also belonged to it in right of its ownership of the goods, or that it held the bill of lading for security for a debt which belonged

to it. Just how it could be the unqualified owner of the debt and only a qualified owner of the goods, when it purchased both, says the court, we confess our inability to see." In almost identical language is *Searles v. Grain Co.*, 80 Miss., 688, citing and approving *Landa v. Lattin, supra; Bank v. White, supra; Finch v. Gregg, supra,* and *Miller v. Bank,* 76 Miss., 84. In the *Searles case* plaintiffs purchased a lot of corn from the Smith Grain Company at a fixed price. Only a part of the corn was shipped, and in order to supply their customers they were compelled to go into the market and buy other corn at a higher price. The corn shipped them was defective in quality, whereby they suffered loss. The Smith Grain Company drew on the plaintiffs for the purchase price of the corn in favor of the Exchange National Bank, and said bank paid said draft, and on other dates they bought other corn and suffered losses in the same way. All the drafts were drawn on the same bank and paid through the same channels. The Court, citing the cases above named, and approving them, says: "This case falls within *Miller v. Bank*, which is in accord with and supported by *Landa v. Lattin, supra; Bank v. White* and *Finch v. Gregg,*" and further says: "We specially refer to the reasoning in *Landa v. Lattin* as thorough and sound. There are cases to the contrary of our views," says the Court, "but they clearly fail to apprehend the true nature of this sort of transaction. The bank buying the draft and bill of lading is bound to comply with all the terms of the contract between seller and buyer. This places it, as to the buyer, in the exact situation in which its assignor stood." On page 290 the Court says: "We think the courts which have taken the other view have dealt with half the transaction--not the whole of it. They have looked to the draft—not to the bill of lading. They have failed to give every factor in the transaction its full significance and to look through form to substance."

Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of transferer to the goods described in them. *Williams v. Railroad,* 93 N. C., 42; *Haas v. Bank,* 144 Ala., 562; *Bank v. Hurt,* 99 Ala., 130 (19 L. R. A., 701; 42 Am. St., 38); *Trust Co. v. Railroad,* 99 Ala., 416 (42 Am. St., 75; 4 Am. and Eng. Enc., 2d Ed., 549).

By the assignment of this bill of lading to Trice he became the owner of the property. *Dowe v. Bank,* 91 U. S., 618; Daniel Neg. Instr., sec. 1734a. By the endorsement of the draft to him he became the owner of the right to receive the purchase money evidenced by the draft.

On arrival of the cotton the plaintiff had the right, if it was short either in quality or quantity, either to refuse it or, if he received it and was sued for the price, to have set up the loss by reason of such defects. *Kester v. Miller,* 119 N. C., 475; *McKinnon v. Morrison,* 104 N. C., 354. In common justice, the consignee should be allowed to see the goods before paying or refusing to pay the draft. The rights of Trice, assignee of the bill of lading, are not greater than those of Nelson, assignor. If Trice had sued consignee and drawee for refusal to pay draft and accept goods, he could recover no more than their value on the contract basis. He cannot put himself on a higher plans by compelling the purchaser to take them without opportunity of inspection, and thus, having collected more than their contract value, refuse to be liable in an action by the purchaser to recover back the excess sum thus extorted. *Finch v. Gregg* has been reaffirmed by *Sloan v. Railroad,* 126 N. C., 489; *Manufacturing Co. v. Tierney* (*Connor, J.*), 133 N. C., 636, and has been cited and followed in other States, *ut supra.*

The bill of lading is a security to the holder of the draft attached thereto that he shall receive the purchase price before he surrenders possession of the property, but it does not protect him from refunding, if by refusal of opportunity to

inspect he collects the full purchase price when the goods upon delivery are found to be below the contract.

Such cases as this could not possibly occur if the consignee was permitted to inspect the goods before paying the draft. The assignee takes the draft and bill of lading, relying on drawer and the goods. He should have no more. If there is a defect in quality or quantity, the holder of the draft and bill of lading should look to the party from whom he bought them to make good, and not, having forced payment out of the consignee and drawee by refusing sight of the goods, refuse reimbursement. This is not fair.

A bill of lading has not the characteristics of negotiable paper, and it should not have. A bill of lading is not good against the company that issues it, even in favor of a *bona fide* holder for value, unless goods of the quality and quantity described therein are actually delivered to it. *Williams v. Railroad,* 93 N. C., 42. Certainly, therefore, it should not be conclusive against the consignee, unless he is afforded an opportunity to examine the shipment as to quantity and quality before accepting or paying a draft attached to the bill of lading. The rule should not be more rigid against the drawee than the holder can enforce it against the railroad or other common carrier.

The rule in this State, allowing the drawee to inspect goods before accepting the draft, thus making the drawee liable for no more than the carrier would be if there was no delivery, *i. e.*, only for goods of the quantity and quality actually delivered, was held the law in this State nearly ten years ago by one of the best and ablest judges on the Superior Court bench, and on appeal he was affirmed by a unanimous Court. *Finch v. Gregg,* 126 N. C., 176. It has ever since been recognized as law here. Parties, including those to this action, are presumed to have dealt with each other, relying upon that ruling being the law. It has worked no hardship. Its revocation will unquestionably protect the vendor and ship-

per in this case in a fraud he has perpetrated, and will deprive consignees of the just protection they have had. Why, then, change it? For what purpose?

Finch v. Gregg has not only been held law in this State for many years, and not denied till now, but our decision has been cited and followed in other States, as above quoted, as well as in our own Court. *Finch v. Gregg* is a just decision, protecting the consignee here against fraud by vendors in distant States. It has "made for righteousness," and should stand. If courts in other States, where the interest of dealers in mercantile paper is the public policy, have specially favored them by assimilating bills of lading to the rights of negotiable paper, that is no reason why we should abandon our own decisions to follow theirs. We did not abandon our doctrine of mental anguish because the courts in some other States, where the claim of telegraph companies to exemption from liability was more favored, held to the contrary.

It has been suggested that vendees of goods shipped here can, by special contract in each case, secure the right to examine the goods before accepting or paying the draft. But why change our decisions to require a special contract? Besides, such contract, if conceded by the vendor, would not be put by railroads in the bills of lading, and it could not be put into the draft without affecting its negotiability; and hence the holder, having no notice, would be exempt, and the opportunity of vendors to commit the same fraud as the vendor in this case, both in the quality and quantity of shipments, will be unrestricted.

There are 380 cotton mills within 100 miles of Charlotte, N. C., and the number is increasing and will largely increase. The adjacent territory is growing more and more incapable of furnishing a full supply of cotton, and it must be shipped in ever-increasing quantities from distant points. Under the just and honest rule laid down in *Finch v. Gregg*, and followed for so many years in this and other States, above cited, the assignee of a draft looks to the drawer till ac-

ceptance, and until then the bill of lading is good against the vendee only to the extent that the quality and quantity of the goods come up to the contract, with the necessary corollary that the consignee can always examine the goods before he assumes unqualified liability by accepting the draft. It is a serious matter to affect our great and growing manufacturing interests by changing the law as we have so held it to be—a law which has protected the consignee, without any possibility of injury to any honest consignor. The holder of the draft usually receives it "for collection"; but if he buys it he should take it on faith of vendor's credit, supplemented only by value of goods. Indeed, the holder will be benefited by a rule which forces the shipper to send goods of the quality and quantity contracted for. Failure to do so will be rare when he knows the consignee has the right to see them.

The change will have a wider application than affecting injuriously our great cotton-milling industry. There are many dealers in North Carolina who buy meats, lard, corn, wheat and flour in the Northwest in large quantities to retail to their customers. These shipments are drawn for, with bills of lading to the shipper's orders attached to the draft, which is usually assigned, as in this case, "for collection." Under the law, as we have held it, without detriment, for the nearly ten years past, the vendee ran no risk, for he has till now had the right to examine the goods before accepting the draft. But if that is now changed, the vendee must assume the risk of such frauds as the vendor has perpetrated in this case, for not only a special contract could not be put into bill of lading or draft, but the vendors of these articles, like Armour, Swift and others, will not make such special contracts, well knowing that the dealers here must buy of them or not at all.

Our rule has worked well. It has protected consignees here. It has not injured any honest consignor. The revocation of the rule will deliver purchasers here into the uncovenanted mercy of distant consignors who cannot be reached by the process of our courts.

JOHN R. PERRY ET AL. v. COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 21 October, 1908.)

1. **Taxation—Poll Tax Increased Over $2—State and County Tax—Special Taxation.**

A special-school district created under Revisal, sec. 4115, may levy a tax on the poll, when submitted to and approved by the qualified voters thereof in an election duly held, in excess of $2, under the provisions of Article VII of the State Constitution. The equation between the property and poll tax established by Article V, sec. 1, and the restriction that the State and county tax combined shall never exceed $2 on the poll, applies only to State and county taxation, and not to municipal or *quasi* public corporations other than counties.

2. **Same—Right to Vote.**

Article VI, sec. 4, of the Constitution, depriving a citizen of the right to vote unless he has paid his tax for the previous year, refers to the poll tax prescribed by Article V, sec. 1, to-wit, that for State and county purposes, and it can never exceed $2. This right of suffrage is therefore in no way affected by any increase of taxation imposed on these special-tax districts.

ACTION heard by *W. R. Allen, J.*, on return to a restraining order, at Louisburg, 22 August, 1908, from FRANKLIN.

From the facts stated in the complaint and admitted in the answer it appears that, under the provisions of Revisal, sec. 4115, a special-school district was created in the township of Louisburg, Franklin County, with power to levy a special tax of 20 cents on the $100 worth of property and 60 cents on each taxable poll, to supplement the public school fund apportioned to such district, provided that such tax levy was first submitted to the qualified voters within the boundaries of said special-school district and approved by them in an election held pursuant to law. Said proposition for a special tax was ratified and approved by the majority of the qualified voters of the district, and the tax levied by the commissioners as provided by the law. The Board of Commissioners, on the first Monday in June, 1908, levied through-

out the county of Franklin a poll tax of $2 upon each taxable poll in said county for State and county purposes, and in addition to this the commissioners are proceeding to levy and collect from the taxpayers of said district the property tax of 20 cents on the $100 and 60 cents on the poll, making the entire poll tax levied on the taxable polls in said district $2.60. And the complaint charges that such levy, to the extent of this 60 cents, is unconstitutional and void, as being levied in violation of Article V, sec. 1, of the State Constitution.

The plaintiff John R. Perry, a resident and taxpayer of said district, and liable to payment of poll tax therein, in behalf of himself and other like taxpayers in said district, instituted this action to restrain the defendants from levying tax alleged to be illegal, on the ground indicated. On the hearing the restraining order was dissolved, and the plaintiffs excepted and appealed.

William H. Ruffin for plaintiffs.
Bickett & White and *Hayden Clement* for defendants.

HOKE, J., after stating the case: While the question presented in this appeal is one of commanding interest and far-reaching importance to the entire State, its correct solution, in our opinion, is readily deducible from decisions of this Court heretofore made and which bear upon the subject with more or less directness. Article V, sec. 1, of the Constitution, after directing that the General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, and that this poll tax on each shall be equal to the tax on property valued at $300. provides that the State and county capitation tax combined shall never exceed $2 on the head. Section 2 of the article provides that the State and county capitation tax shall be applied to the purposes of education and the support of the poor, and that not more than 25 per cent. of such tax in any

one year shall be appropriated to the support of the poor. Section 6 of the same article provides that the taxes levied by the Board of Commissioners for county purposes shall be levied in like manner as the State taxes, and shall never exceed the double of the State tax, except for a special purpose and with the special approval of the General Assembly. Construing these sections, the Supreme Court, at the last term, in *Railway v. Board of Commissioners of Mecklenburg County* and *Railway v. Board of Commissioners of Buncombe County*, held that this restriction on the amount of the poll tax contained in section 1 shall be given the significance which its terms clearly import—that the State and county capitation tax combined shall never exceed $2 on the head, and that this limit fixed on the poll tax for the purposes indicated—that is, for the State and county—shall be always observed, notwithstanding that a given tax may be for some special purpose and with the special approval of the General Assembly. And in *Wingate v. Parker*, 136 N. C., 369, this Court has held that the equation of taxation established by Article V, sec. 1, only applied to State and county taxation and did not extend to municipal corporations or public *quasi* corporations other than counties, but that in reference to these the regulations and restrictions in regard to taxation were contained in Article VII of the Constitution, supplemented by section 4 of Article VIII, a section which by inadvertence seems to have been given an improper placing in Article VIII instead of Article VII. In the opinion *Chief Justice Clark*, for the Court, speaking to the question, said: "It is clear that this section applies solely to State and county taxation. It requires (1) that the General Assembly shall levy a capitation tax on every male between twenty-one and fifty years of age; (2) that it shall be equal to the tax laid on $300 of property at cash valuation; (3) that the county commissioners may exempt from capitation tax, in special cases, on account of poverty and infirmity; and (4) that the State and county

capitation tax shall never exceed $2 on the head. If this section embraces municipal taxation, such taxation could very rarely be levied at all, for in most if not all the counties this limit has been reached."

The opinion further quotes with approval from that of *Merrimon, J.,* in *Jones v. Commissioners,* 107 N. C., 248, as follows: "In *Jones v. Commissioners,* 107 N. C., 248, *Merrimon, C. J.,* for a unanimous Court, holds that the equation prescribed by Article V, sec. 1, does not apply to municipal corporations. On page 258 he says: 'But it is settled by many decisions of this Court that it (Article V, sec. 1) does not establish an exclusive system or scheme of taxation applicable and to be observed in all cases and for all purposes; that on the contrary it applies only to the revenue and taxation necessary for the ordinary purposes of the State and the several counties thereof. * * * The article does not provide or declare that the equation so established shall be of universal and exclusive application; it expressly mentions only the State and counties in connection with the subjects of revenue and taxation, and does not mention cities, towns and other municipal corporations, or make any reference thereto or provide for or as to them. * * * And it is singular that it fails to make some reference to municipal corporations in such respect if it was intended to embrace them. That it does not so intend is more manifest, in that they are expressly provided for in such respects in another distinct article of the Constitution. * * * Article VII of the Constitution is entitled "Municipal Corporations," and is exclusively devoted to that subject.' This article, in section 9, provides that 'All taxes levied by any city or town must be uniform and *ad valorem* upon all property in the same,' and nowhere is there any provision requiring the equation of taxation between property and polls to be observed. And in concluding the opinion he further says (on page 263): 'We are therefore of opinion that the equation and limitation of

taxation established by the Constitution (Art. V, sec. 1) applies only to taxes levied for the ordinary purposes of the State and counties.' And again (at bottom of page 264): 'We know that it has been said, *obiter,* in several cases, that the equation and limitation of taxation referred to above must be observed in levying taxes for municipal purposes, but it has not been so decided—certainly not expressly decided—nor can it be, in our judgment, without defeating the true intent reasonably appearing.' "

True, these decisions are directly on the question of the equation of taxation established by Article V, but every reason for the ruling on the question of the equation bears with full force on the subject of this restriction on the amount of the poll tax, with the additional and conclusive reason that such restriction in express terms is confined to the "State and county capitation tax." Again, in *Smith v. School Trustees,* 141 N. C., 143, this Court, after most careful consideration, decided as follows:

"2. Chapter 204, Private Acts 1905, creating a graded-school district and authorizing its trustees to levy a tax and issue bonds, when the act is approved by a majority of the qualified voters, is a valid exercise of legislative authority.

"3. The Legislature can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and, when accepted and sanctioned by a vote of the qualified electors within the prescribed territory as required by our Constitution (Art. VII, sec. 7), may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose.

"4. School districts are public *quasi* corporations included in the term municipal corporations, as used in Article VII, sec. 7, of our Constitution, and so come within the express provisions of section 7, that 'No county, city, town or other municipal corporation shall contract any debt, pledge

its faith or loan its credit, etc.; nor shall any tax be levied, etc., unless by a vote of the majority of the qualified voters therein.' And the principle of uniformity is established and required by section 9 of this article."

In the case of *Smith v. Trustees, supra*, the taxing district was created by special act of the Legislature, and the officers of the *quasi* public corporation were given authority to levy and collect the special tax provided for, while in the present case the district was established, as stated, pursuant to the general law (Revisal, ch. 89, sec. 4115), and the taxes specified are to be collected by the Board of Commissioners. But the main purpose of the incorporation is the levying of a special tax, for a definite purpose, within certain restricted portions of a given county or township, and levying it only where sanctioned by a majority of the qualified voters of the district, and bringing such levy within the other provisions and restrictions of Article VII of the Constitution, that addressed more especially to municipal and other corporations of a *quasi* public nature, as contemplated by that article; and whether the collection of the tax was done by specified local agencies or by the general authorities of the county, this was only a ministerial matter, a question of method simply, which was not of the substance and should in no way affect the result.

From these authorities it is clear that the tax in question (the 60 cents in excess of the $2 already levied for State and county purposes) is not within the restriction of Article V, sec. 1, of the Constitution, but that the same is a tax imposed for a definite purpose by a special taxing district, coming as a public *quasi* corporation under the provisions of Article VII of the Constitution, and subject only to the limitations and restrictions contained in that article, notably in section 7, that no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by officers of the same,

except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein; and of section 9, to the effect that all taxes levied shall be uniform and *ad valorem*. In aid of the construction we place upon the provision of the Constitution bearing upon this question, good reasons could be suggested for the distinction in the two classes of taxation. Anticipating, as the result has proved, that the general State and county taxation would very generally reach the limit of $2, the framers of the Constitution did not deem it well to place an arbitrary restriction on all local effort in communities whose enterprise might suggest and financial condition justify a greater amount of taxation than that allowed by the general law. And it was no doubt further considered that the restriction contained in Section VII, forbidding the levy of any unusual tax, except when sanctioned by a majority of the qualified voters of a given district, would operate as a wholesome check against excessive taxation or extravagant expenditure. Certain it is that, with the exception of the restraints indicated, the matter is not further affected by the Constitution, but is referred entirely to the legislative will. As to taxation within these special districts, it is theirs to observe or disregard the equation established by Article V in reference to State and county taxes, and to exceed or abide by the limit established in said article in reference to general taxation. And this is, no doubt, the reason that the convention in framing the Constitution considered it especially pertinent and desirable to insert section 4, Article VII, containing an admonition that the Legislature should take special care to restrain these local taxing districts, cities, towns and other municipal corporations from excessive levies or extravagance and waste in municipal expenditure. To establish such restraints as "will prevent abuses" in these matters is the language of the organic law.

It is suggested that the construction we give to the Constitution will in certain instances make it possible, by the levy

of an exorbitant poll tax, to deprive many citizens within a special district of the right to vote, and this by reason of the provision of the Constitution, "That no person shall be allowed to vote unless he shall have paid his poll tax for the previous year." But not so. The language of Article VI, section 4, of the Constitution, being the article relating to and regulating the right of suffrage, provides that no one shall be entitled to vote unless he has paid his poll tax for the previous year, "as prescribed by Article V, section 1, of the Constitution," thus providing that on payment of the poll tax allowed and established in Article V the right of suffrage in this respect is established, and this poll tax, as we have seen, can *never* exceed $2.

There is no error in dissolving the restraining order, and the judgment to that effect rendered below is

Affirmed.

CONNOR, J., concurring: Appreciating the reasons upon which the well-considered opinion of *Mr. Justice Hoke* is based, I am constrained to concur in the conclusion reached. My investigation, however, in *Railroad v. Commissioners, ante,* 220, impressed upon my mind the conviction that the framers of the Constitution of 1868 did not anticipate that any poll tax should be levied for other than "State and county purposes," and for those it should not exceed $2, and should be applied only to the purpose of education and the support of the poor. I was strengthened in that opinion by the fact that an examination of the Constitution of every other State in the Union showed that no poll tax is levied except for those purposes. In a large majority of States the poll tax is limited to a certain sum, and in none can the limit fixed be exceeded. Unfortunately, the Convention of 1868 dealt with the subject of taxation in two separate and distinct articles of the Constitution, thus giving foundation for the construction now adopted, that the equation and limitation do not apply to municipal or *quasi* municipal corporations—

that they are subject to such poll taxation as the Legislature may see fit to impose. I do not think that the subject of poll tax for other than general taxation "for State and county purposes" was considered by the members of the Convention. No such tax has ever been levied other than by the State, and this was required "to be uniform throughout the State." Amendment 1835. The history of the struggle in this country between those who, with Judge Cooley, regard all poll taxation, except in a few cases, as both unjust and impolitic, and therefore not "of common resort in modern times," and those who have sought to impose upon the privilege of citizenship a tax, justifies the conclusion that, as in other States the poll tax was to be expressly limited both in respect to its amount and the purpose to which it should be applied. I cannot but think that the failure to do so is unfortunate. While I sympathize with the tendency in this State to encourage the spirit of local self-government by the establishment by legislation of special districts for the purpose of providing for and stimulating public schools, good roads and other matters of local interest, I regret to be compelled to leave the question of the amount of poll tax which may be levied open to the changes and chances of legislation and local elections. I fear that confusion and uncertainty will follow. If, by establishing these local divisions of our counties and townships, called, for want of a better term, *quasi* municipal corporations, the poll tax may be enlarged to any amount, is conceded, the constitutional restriction made for the protection of the wage earners may be largely legislated away. Professor Holland, in his work, "Studies of State Taxation," gives some valuable information and reflections on the subject of capitation taxation. He refers to the North Carolina system as "a dead weight which hangs so heavily over the small property owner." Of course, we have no other duty or power than to declare the law as the people in the exercise of their sovereignty have made it. Speaking, however, for myself alone, I cannot but regard the

conclusion to which we are brought as unfortunate. The amount of the tax upon the man, the citizen, should be fixed by the Constitution, and not left open to legislative action or local elections. The extent to which the poll tax may be increased through the medium of *quasi* municipal corporations will be difficult to fix upon a substantial and satisfactory basis. Fortunately, in this case the tax goes to the support of the public school, but there is nothing in the Constitution, as we interpret it, by which such taxation may be confined to this purpose. I fear that a way has been opened by which the question which should be removed from the domain of discussion and uncertainty will become a vexatious and disturbing element of discord. Like the right of suffrage, the capitation tax should be disturbed only by the people, in the exercise of their sovereign power, by amending their Constitution.

DUFFIE, SOLICITOR, EX REL. ANNIE R. WILLIAMS ET AL. v. W. H. WILLIAMS.

(Filed 21 October, 1908.)

Guardian and Ward—Commingling of Funds—Ward Repudiating Investment.

When a guardian deposits in a bank his ward's money to his own credit, upon general account, he becomes the debtor of his ward to the full extent of the amount. If he makes loan from the general balance to his credit, taking a mortgage or security to himself as guardian, and afterwards buys the land at sale under the mortgage to protect the loan, the ward may, upon arrival of full age, refuse to accept the loan and hold the guardian and the sureties on his bond responsible for the amount so deposited.

ACTION from DUPLIN, heard on report of referee by *Neal, J.*, at chambers, 5 May, 1908.

This cause was before the Court at the Fall Term, 1903 (133 N. C., 195), when all matters in controversy were dis-

posed of, except the rents and the Bradham loan. It was sent back to the referee for the purpose of passing upon these items in the account. Upon the hearing the plaintiffs abandoned their claim for rents. The referee found as a conclusion of fact, largely upon defendant's own evidence, that he did not keep the funds of his wards separate from his own, but charged each item upon its receipt against himself, with compound interest, and placed such money in his personal funds. That, as appears by his account, he owed his wards, 1 January, 1899, $589.19. On 10 January, 1889, he loaned to Bradham $700, taking a note, payable to himself as guardian, and taking mortgage on real estate in same capacity to secure the loan. The money was not paid, and in his efforts, under the advice of counsel, to foreclose the mortgage, he made a compromise and bought the real estate in for $565.10, taking deed to his wards. He also paid out several amounts for counsel fees and costs, amounting to $122.65. By reason of a defect or mistake in the description of the real estate, upon which defendant supposed he was getting a mortgage, a loss was sustained. The referee, upon this conclusion of fact, found as a conclusion of law "that the transactions between W. H. Williams and George W. Bradham were the personal transactions of W. H. Williams, and not transactions by him as guardian." He held that defendant was not entitled to credit for the amount paid out for the purchase of lot and expenses. Exceptions were duly filed to the referee's conclusions of fact and law. His Honor overruled the exceptions and confirmed the report, rendering judgment accordingly. Defendant excepted, assigned error and appealed.

Stevens, Beasley & Weeks for plaintiffs.
Rountree & Carr for defendant.

CONNOR, J., after stating the case: No question affecting the *bona fides* of defendant's conduct in regard to the Brad-

ham loan, or his action in regard to it, is made. It is found that in his action regarding the property he acted under advice of counsel. The difficulty which defendant encounters in his application to have the amounts claimed by him allowed as credits grows out of the finding of fact, which is supported by his own evidence, that on 10 January, 1889, he had no funds, in the sense of notes, bonds or money, on hand belonging to his wards. He owed them, on a balance struck, $589.19. He loaned Bradham $700 of his own money and in perfect good faith, intending thereby to secure to his wards the amount due them, taking a note and mortgage to himself as guardian. He could not loan his wards' funds, because he had none. He was simply their debtor to the amount of $589.19. He could not pay this debt by investing his money in a note and mortgage for $700, payable to himself as guardian. If the investment resulted in a loss of the money, it was his misfortune and not theirs. If he had, upon stating his account, paid to himself in money the balance due, by depositing in bank or setting apart the specific amount separate from his own money, the money with which alone he could pay the debt would have become the property of his wards. If he had, as was his duty, loaned out this amount, using that degree of prudence in regard to security imposed upon him, he would in the event of loss have been absolved from liability. The learned counsel for defendant are entirely correct in their contention that only good faith and due diligence are required of a guardian in dealing with his ward's money. The authority cited by them, and many others, sustains this position. *Covington v. Leak*, 67 N. C., 365; *Luton v. Wilcox*, 83 N. C., 26. The difficulty is that he was not dealing with his wards' estate, but with his own money. If upon coming of age the wards had, as they were entitled to do, ratified the transaction and accepted the property, there would have been no further liability on the guardian, but they were not compelled to do so. They rejected it and demanded the

money due them. This they were entitled to do. The only safe rule to be observed in dealing with trust funds is that prescribed by the law, to keep them separated from the personal funds of the trustee. We find no reason for disturbing the judgment. It must be

Affirmed.

THE CLEVELAND-CANTON SPRINGS COMPANY v. THE GOLDSBORO BUGGY COMPANY.

(Filed 28 October, 1908.)

Contracts, Breach of—Measure of Damages—Matters in Diminution—Pleadings—Burden of Proof.

When it is established that defendant contracted with plaintiff for the latter to furnish special goods to be manufactured, and the defendant has wrongfully refused to take them, the damages sustained by the plaintiff is the difference between what it would have cost the plaintiff to carry out its part of the contract and the contract price, in the absence of averment and proof by defendant of any fact in diminution of the damages, the burden being on defendant.

ACTION heard before *Guion, J.*, and a jury, at June (Special) Term, 1908, of WAYNE.

Defendant appealed.

W. C. Munroe for plaintiff.

W. S. O'B. Robinson and *Aycock & Daniels* for defendant.

CLARK, C. J. The defendant contracted with the plaintiff to take certain springs to be manufactured by the plaintiff at a given price, and after taking a small portion of each order refused to take the remainder. The springs were to be manufactured by the plaintiff in accordance with the order of the defendant. The only exception of the defendant is to the charge of the Judge, to the effect that the measure of plaintiff's damages was the difference between what it would

have cost the plaintiff to carry out its part of the contract and the contract price. This is correct, nothing else appearing. *Williams v. Lumber Co.,* 118 N. C., 937; *Oldham v. Kerchner,* 81 N. C., 430; *Hinckley v. Steel Co.,* 121 U. S., 275.

If the defendant had intended to rely upon the fact that the plaintiff could not have complied with its part of the contract, or that it was otherwise profitably employed during the time it would have been engaged in filling the defendant's order, or that it could have sold such of the articles as it did manufacture for as high a price as the defendant agreed to pay, or any other matter in mitigation of damages, it should have set up the same in its answer, for such defenses must be pleaded. *Oldham v. Kerchner, supra,* where this point is fully discussed; *Lumber Co. v. Iron Works,* 130 N. C., 584.

In *Lumber Co. v. Iron Works,* 130 N. C., 590, the Court says: "It may be that the plaintiffs were profitably employed all the while, and really performed other work which was more remunerative than would have been the profits on those crates, which they could not have done had the rollers been duly repaired and delivered to them; or, for the want of repaired rollers, they may have been unemployed wholly or in part, with their laborers on their hands at an expense and with their machinery idle and deteriorating in value." But as to this the pleadings are silent, and we must rule upon the questions as presented to us by the record.

In Current Law, 848, it is said: "What the servant earned or could have earned in the meantime is a matter of defense, and should be pleaded in mitigation of damages; and the employer has the burden of showing that other and profitable employment than that in which plaintiff in fact engaged, in order to reduce the damages, had been offered and declined, or might have been found." This authority cites *Latimer v. Cotton Mills,* 66 S. C., 135, which sustains the text. Besides, the defendant introduced no evidence, and

the testimony for the plaintiffs is uncontradicted, that the output of their shops was reduced by the amount of defendant's order.

If the plaintiff did or could have reduced its loss by selling the goods to others, it was its duty to do so; but the burden was upon the defendant to allege and prove this fact in mitigation of damages. *Oldham v. Kerchner, supra.* It was in default by its breach of contract, and liable for the difference, under the rule laid down by the court, unless it alleged and proved facts in mitigation.

No Error.

G. W. WILSON ET AL. V. J. C. FISHER AND PETER BULLOCK.

(Filed 28 October, 1908.)

1. **Procedure—Exceptions—Nonsuit.**

It is the more orderly course of procedure for the plaintiff, whose prayer for special instruction has been refused, to note exception, instead of taking a nonsuit.

2. **Deeds and Conveyances—Mortgagor and Mortgagee—Equity of Redemption, Agreement to Surrender—Void Conditions.**

Immediately after the *habendum* clause in a paper-writing, called by the parties a deed, it was stated that the writing was to be null and void upon the maker's paying a sum certain, with interest, at a specified time, and on the margin thereof a provision that, if the grantee pay a certain sum at the time specified, the "deed" was to be null and void. No power of sale was contained in the deed. *Held*, (1) the deed is a mortgage upon its face; (2) an agreement made by the mortgagor at the time of the execution of a mortgage to surrender the equity of redemption for a consideration then fixed to be paid at maturity is invalid.

3. **Same—Mortgagee in Possession—Permanent Improvements—Reference.**

When the mortgagee has been in peaceful possession of the mortgaged premises for a long time, claiming them as his own by reason of payment of a certain fixed sum for the equity of redemption provided for by the terms of the instrument, it is within the equity jurisdiction of the court, in an action to redeem,

to permit him to offset against the rents and profits the increased value of the lands, owing to permanent improvements he has put on them, and a reference is proper to state an account between the parties.

ACTION tried before *Neal, J.,* and a jury, at February Term, 1905, of PENDER.

On and prior to 8 December, 1894, Callie F. Wilson, wife of plaintiff G. W. Wilson and mother of the other plaintiffs, was the owner of the land in controversy. She had joined with her husband in the execution of a mortgage on said land to Gibson James for the purpose of securing the payment of a debt of her said husband, amounting on said date, 8 December, 1894, to the sum of $100. The debt was overdue and Mr. James was pressing Wilson for payment. In this condition of affairs defendant Fisher says: "Wilson had been to me to borrow money. I told Wilson that I would give him twelve months to redeem the land." Mr. J. R. Marshburn, a witness for defendant, thus describes the transaction, which Fisher says is correct: "Wilson was in destitute circumstances and was around everywhere trying to borrow the money to pay James' mortgage. He offered me the land for $150. He asked me to try to sell the land or borrow the money for him. I told Fisher about Wilson's land, and told him I thought it a pretty good chance. I told Wilson that I thought Fisher would buy. Then Fisher and Wilson traded. Fisher advanced $100 to Wilson. I drew the deed. Fisher was to pay $100 down. If Wilson and wife should pay back $100 and 8 per cent. interest, deed stood null and void; and if not, then Fisher was to pay $50 more; then deed was good. Wilson said he had received the $50 and had rented the land from Fisher." The portions of the deed pertinent to the controversy are as follows: The land is conveyed, in the usual form, for a recited consideration of $100. Immediately following the *habendum* are these words: "The condition of this deed of conveyance is such that, if the said parties of the first part

shall well and truly pay or cause to be paid the inserted amount in this deed, together with interest at 6 per cent. per annum at the expiration of twelve months from date of deed, then this (deed) shall be null and void." On the margin of the deed, in the handwriting of the draughtsman, written before the deed was signed, are these words: *"Provided further,* that if the party of the second part fail to pay a certain bond or note bearing even date herewith, to the amount of $50, then this deed to be null and void; otherwise to be in full force and effect. And the said parties of the first part shall immediately render up possession of the said hereby granted property to the said party of the second part." The deed, with the marginal addition, was duly registered. Callie J. Wilson died in May, 1902. Wilson never paid any part of the debt, but upon its maturity took the $50 from Fisher and he took the land. Wilson rented two years and moved away. Wilson says: "If I paid him $100 the land was to be mine. If I did not pay him the $100 he was to pay me the $50 and the land was to be his." There is no substantial controversy in regard to the terms of the contract and the conditions under which it was entered into. The opinion of the witnesses as to the real value of the land at the date of the deed varies from $150 to $400. Fisher says that he made some little improvement on the land—took in just a little land and moved some old buildings; that he sold it to defendant Bullock for $550—this and another piece of land. The rent was worth some $20 or $25. Plaintiffs requested his Honor to hold as a matter of law, upon an inspection of the deed, that it was a mortgage. This was declined. Plaintiffs excepted.

At the close of the evidence plaintiffs asked his Honor to instruct the jury that, upon a consideration of all the evidence, they should find that the paper-writing executed by Wilson and wife to Fisher was a mortgage, and that they should

answer the issue accordingly. This was declined, and plaintiffs excepted, submitted to a judgment of nonsuit and appealed.

R. G. Grady and *Kenan & Herring* for plaintiffs.

Rountree & Carr and *Stevens, Beasley & Weeks* for defendants.

CONNOR, J. We are of the opinion that, if there had been any controverted allegations of fact, the more orderly course of procedure would have dictated to plaintiffs to note their exception and await the verdict under the instruction of the court, noting exceptions as they may have been advised. By declining the instruction asked his Honor did not intimate that they could not recover, thereby driving them to elect whether they would submit to a nonsuit or have a judgment against them. It may be that his Honor was of the opinion that the legal character of the instruction was dependent upon the intention of the parties, which was a fact to be found by the jury. However, as we differ with his Honor upon the construction of the deed, there was nothing to be submitted to the jury. In our opinion, the deed was upon its face a mortgage, with a provision cutting off the equity of redemption by the payment of $50 by the mortgagee, if the debt of $100 was not paid at maturity. There was an absolute conveyance, with a well-defined, unmistakable clause of defeasance, entitling the grantor to defeat the deed by paying the amount loaned. But for the marginal addition, no question could have arisen respecting the character of the deed or the rights of the parties to it. There being no power of sale, the only method by which the equity of redemption could have been foreclosed was by a civil action in the nature of a bill in equity, followed by a judgment giving the mortgagor a reasonable time within which to redeem, and, upon failure to do so, to direct a sale of the property in accordance with the course and practice of the court. The testimony of Fisher

and Marshburn shows that the real transaction was a loan of money, secured by a conveyance of the land, with a right to redeem by paying the "amount inserted"—$100. Hopkins on Real Property, p. 186; *Wilson v. Weston,* 57 N. C., 350. In *Robinson v. Willoughby,* 65 N. C., 520, *Rodman, J.,* says: "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this is held to be a mortgage in a court of equity, and the debtor has a right to redeem." The same learned Judge says: "In the present case the express terms of the writing indicate a mortgage, and the circumstances do not contradict, but sustain this view." This language is peculiarly applicable to this appeal. The plaintiff was in debt; he was trying to borrow money. Fisher says: "Wilson had been to me to borrow money. I told him that I would give him twelve months to redeem the land." All of the testimony sustains the construction of the deed as a mortgage; it was so understood and intended by the parties. *Bunn v. Braswell,* 139 N. C., 135. The marginal addition, with equal clearness, shows that the parties undertook to add to the relation of mortgagor and mortgagee an agreement on the part of Wilson to sell his equity of redemption, in the event he did not pay the debt, for $50. This, for manifest reasons, the courts have uniformly refused to enforce. "If the transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem; such a case being, on grounds of equity, an exception to the maxim *Modus et conventio vincunt legem.* Nor can a mortgagor, by any agreement at the time of the execution of the mortgage that the right to redeem shall be lost if the money be not paid by a certain day, debar himself of such right." *Robinson v. Willoughby, supra.* This Court, following an unbroken line of decisions in England and this country, has uniformly held that an agreement made at the time of the execution of the mortgage to surrender the equity

of redemption for a fixed amount is invalid. The maxim, "Once a mortgage, always a mortgage," is too deeply rooted in our jurisprudence to be brought into controversy. *Ruffin, J.*, in *Poindexter v. McCannon*, 16 N. C., 377, says that when upon the face of the instrument it is doubtful whether a transaction is a conditional sale or a mortgage, the "court will lean to considering it a mortgage," and will look to the "acts of the parties and the circumstances attending the transaction. When it is once determined to be a mortgage, all the consequences of account, redemption and the like follow, notwithstanding any stipulation to the contrary; for the power of redemption is not lost by any hard conditions, nor shall it be fettered to any point of time not according to the course of the court. This is well expressed by the familiar maxim, 'Once a mortgage, always a mortgage.'" It is well settled, upon sound equitable principles, that contracts made at the time the mortgage is executed, restricting the right to redeem, are void. "When one borrows money upon the security of his property, he is not allowed by any form of words to preclude himself from redeeming." Jones on Mortgages, 251. It is said: "A man shall not have interest on his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." *Comyns v. Comyns*, 5 Irish Eq., 583. In *Broad v. Self*, 9 Jur. N. S., 885, it is held "that a mortgagee cannot at the time he advances his money stipulate for his advantage that not strictly belonging to his contract of mortgage." We are of the opinion (1) that the deed is upon its face a mortgage; (2) that, taking the defendant's evidence to be true, the transaction was a loan of money to be secured by mortgage; (3) that the attempt to fix a price upon the equity of redemption and retain to the mortgagee the power to deprive the mortgagor of the right to redeem by paying the amount stipulated was void. His Honor was, therefore, in error in refusing either of plaintiffs' motions. There should be judgment directing a decree per-

mitting plaintiff to redeem upon paying the amount due, including the $50, with interest at 6 per cent., less reasonable rent. While it is the general rule that a mortgagor in possession is not entitled to pay for improvements, we are of the opinion that, as the plaintiffs in this action are asking equitable relief, after so long a time they should account in diminution of rents for such enhancement in value of the property as may be found by reason of permanent improvements put thereon by defendants. There should be a reference to state an account between the parties, upon the principle indicated in this opinion. Let this be certified to the Superior Court of Pender.

Error.

P. W. FANNING v. J. G. WHITE & CO. AND NORFOLK AND SOUTHERN RAILWAY.

(Filed 28 October, 1908.)

1. Trespass—Negligence—License—Explosives.

One storing dynamite on his own premises for legitimate purposes, in boxes, with the word "Dynamite" written or printed on the box containing it, placed in a shanty with the door open and window torn out, thus affording ample opportunity to see the danger, owes no further duty to a person going upon the premises without either an express or implied license, and is not liable to him for damages caused by his companions shooting into the shanty and exploding the dynamite, not knowing it was there.

2. Same—Independent Acts.

When one trespasses upon the premises of the owner of lands and shoots into a shanty in which the owner had rightfully placed dynamite, and thereby causes an explosion, which injures a third person, the act of shooting, being done by an independent, intelligent agency, was the cause of the injury, and the owner of the lands is not liable for damages.

CLARK, C. J., dissenting, *arguendo;* HOKE, J., concurs in dissenting opinion.

ACTION tried before *W. R. Allen, J.,* and a jury, at May Term, 1908, of CRAVEN.

Plaintiff sues the defendant railroad company and White & Co., contractors, for damages by reason of injuries alleged to have been sustained by the negligence of defendants. The testimony showed that defendants White & Co. were, on and before 14 May, 1907, engaged in constructing a railroad for defendant Norfolk and Southern Railroad Company from New Bern to Washington, N. C.; that while so engaged defendants White & Co. stored in an old shanty a large quantity of dynamite, in boxes, upon which were painted or printed the words "Handle With Care—Dynamite." There was no sign or warning on the shanty. The shanty was rotten, the window was torn out and the door open on the side next to the river. The back end was nailed up. It was about 20 feet from the Neuse River, about 180 feet from the county road and 50 feet from the railroad track, on the right of way. There was a little shanty about 70 yards away. The county road led to the bridge over the river to the city of New Bern, about one mile distant. The village of Bridgeton had lately been incorporated, and included the location of the shanty. It is about one-half to three-fourths of a mile from the foot of the county bridge to the railroad bridge. The principal buildings in Bridgeton are located "right at the foot of the county bridge." The growth around the shanty was gallberry bushes. The shanty was at an isolated place when the tide was high, and when low there was a good place to walk on the banks of the river. Plaintiff had resided about 200 yards away from the shanty for about two we , did not know that dynamite was in it. On Sunday morn .14 May, 1907, plaintiff, in company with McGhee, went a ne river for the purpose of bathing. On their return they passed near the shanty, back of it, near the river. McGhee had a pistol and had fired four or five times at trees. He said that he had one more ball, and asked plaintiff to show him something to shoot at. While plaintiff was looking around, McGhee shot at the shanty. The ball passed through a hole and struck the

dynamite, causing an explosion, blowing up the shanty, trees, etc., and injuring plaintiff. The shanty, 70 yards away, was injured and several houses in Bridgeton shaken and window lights broken. The same effect was felt in New Bern. The plaintiff did not direct or advise his companion to shoot at the shanty.

At the conclusion of the evidence introduced by the plaintiff, defendants moved for judgment of nonsuit. Motion allowed. Plaintiff excepted and appealed.

D. E. Henderson and *D. L. Ward* for plaintiff.
Moore & Dunn for defendants.

CONNOR, J., after stating the case: The injuries sustained by plaintiff resulted from the shooting by McGhee into the shanty, as set out in the record in *McGhee v. Railroad*, decided at the last term of this Court and reported in 147 N. C., 142. In that case the defendant demurred to the complaint, in which it was charged that the shanty containing the dynamite was a public nuisance. It was then strongly insisted and, in the dissenting opinion, maintained that the demurrer admitted the allegation. His Honor, on the trial of this case, heard the plaintiff's testimony, from which it appears that the shanty was 60 yards from the public highway and that the window was "torn out," the door stood open and the boxes containing the dynamite were so marked as to give warning to any person who would take the trouble to look into the door or the open place in which the window had been. The majority of the Court thought, for the reasons given in the opinion, that, conceding the truth of the allegation in the complaint, the dynamite stored in the shanty was a public nuisance, the plaintiff could not recover. Without repeating what we have so lately said, we are of the opinion that the testimony here falls far short of showing that defendants were maintaining any nuisance. To store dynamite being used for a legitimate purpose necessary for the construction of a rail-

road on its own right of way, in a shanty with the door open and the window torn out, affording any person ample opportunity to see the danger, with the warning written or printed on the boxes, cannot violate any duty owing to a person going upon the premises without a license, either express or implied. The basis of the decision in *McGhee's case* being that defendant owed no duty to him in regard to storing the dynamite, and that it could not by any reasonable prevision have foreseen that anyone would shoot into the shanty, we are unable to perceive any ground upon which the plaintiff's case can be distinguished. If, as we then held, the explosion of the dynamite was not the result of any actionable negligence on the part of the defendants, but of the wrongful act of an independent, intelligent agent, we do not see how any liability can attach for the injuries sustained by plaintiff. If I have an article or a structure on my premises, entirely harmless unless interfered with by a trespasser, and I have no reasonable ground to anticipate that a trespasser will come upon my premises and interfere with the structure, and two trespassers, in company, come together, and one of them, by interference, causes injury to the other, the law will attribute the injury to the interference of the intelligent, intervening agent and not to the condition created by me. This principle is illustrated by the decision in *Harton v. Tel. Co.*, 146 N. C., 429. It is there said that, assuming the pole to have fallen by defendant's negligence, the act of Carpenter in replacing it in a dangerous position was the *causu causans* of the injury sustained by plaintiff's intestate. In what respect, upon principle, does this case differ from that? Conceding that defendant was negligent in storing the dynamite, which we do not hold, it would never have injured the plaintiff but for the interference of McGhee, his cotrespasser. As we held in *Harton v. Tel. Co.*, *supra*, that the pole, lying across the road by defendant's negligence, could never have fallen upon the plaintiff's intestate unless

Carpenter had interfered with it, so here the dynamite was absolutely harmless but for McGhee's act of shooting into the shanty. As it now appears, by walking a few steps he would have seen that it contained boxes marked "Dynamite." Without pursuing the subject further, we entertain no doubt that his Honor, both upon principle and authority, correctly directed judgment of nonsuit. There is

No Error.

CLARK, C. J., dissenting: The plaintiff having been nonsuited, his evidence must be taken as true, with the most favorable inferences which a jury could have drawn therefrom. *Stone v. Railroad,* 144 N. C., 221. It appears therefrom that the defendants stored a quantity of dynamite in an old two-room shanty, about 60 yards from the county road and 50 feet from the railroad track, over which a half dozen trains passed daily. The rear end of the shanty towards the public road and railroad track was nailed up. At the other end, next to the river, the door was sometimes open and one of the windows was broken out. There was nothing to indicate that a dangerous explosive was stored there. The plaintiff and one McGhee were strolling there, when, without any notice to plaintiff or participation by him, McGhee fired his pistol at a knot hole in the rear end of the shanty. Neither McGhee nor plaintiff had any suspicion that dynamite was stored there. The shanty was located within the corporate limits of the town of Bridgeton, which contains 300 or 400 inhabitants, and not far from the bridge, from New Bern, over Neuse River, and within 70 yards of a flag station on the railroad.

Upon the firing of the pistol an explosion followed, which cut down the trees 100 yards around, excavated a hole 12 feet deep and 16 feet square, moved the railroad track 12 to 15 inches, blew the end out of a house 70 yards off, and knocked the plaintiff 20 or 25 feet, burying sticks in his face an inch deep. Not a splinter of the house was left. The

explosion occurred about fifteen minutes before the passenger train was scheduled to pass. The dynamite was stored in the rear room, where no one would be likely to see it. A covey of partridges were picked clean by the explosion, and a dog was blown up into a tree. The explosion was decidedly felt in New Bern, across the river. It was also in evidence that the defendants White & Co., the contractors who placed the dynamite in this house, had not worked in that vicinity for six months, their railroad work being completed, and trains were running regularly.

It ought not to require any argument to prove that it was the grossest negligence to deposit a high-powered explosive, in a quantity capable of producing the above effects, in a house within 50 feet of a railroad track over which passenger trains were running, and within 60 yards of a much-traveled public road leading from a large town like New Bern, which was near by, without any notice posted on the house or other indication of the deadly power concealed within. More especially was this so when the party who had placed the dynamite there had removed from the vicinity for six months, and there was no purpose for which the dynamite could longer be used, and no one could suspect, in the absence of all notice or warning, that there was any dynamite in the vicinity. Indeed, the passenger train, by only some fifteen minutes, missed this explosion, which moved the railroad track bodily, sideways, 12 to 15 inches. It was not only negligence, but criminal negligence, to leave the dynamite in such a house, unguarded and without any notice posted, for six months after its owners had left, in such close proximity to a railroad track and a public road.

If it be conceded that McGhee was guilty of contributory negligence (which would debar him from recovery), the plaintiff was an innocent bystander and in nowise responsible therefor. The plaintiff could not have been injured by the negligence of McGhee in firing his pistol without the concurring

(and far greater) negligence of the defendants. They were, as to the plaintiff, joint tort feasors, and at his option he could sue either or both.

Had this been a spring gun, the owner of the premises, who had left it there for six months without any notice, would be liable for any damage resulting. For a stronger reason, he is liable when it is 1,600 pounds of dynamite.

"The owner of a farm leased small parcels in the middle of it to laboring men. A farm road approached the holdings, but did not reach them. Towards the leased parcels from the end of the road the lessor stored a box of dynamite, with cartridge exploders, under a low shed made against a stump and only partially enclosed, and in a rough bound box, not always kept covered and never securely fastened. A child of one of the lessees who had been at work in the field went into the shed, broke one of the cartridges from the box and, striking it with a stone, exploded it and was injured. Neither he nor his father knew what was kept in the shed or knew of any danger there or of any reason for keeping away from it, and there was no warning on or about the shed, except the word 'Powder' written on the box, which neither of them could have read: *Held,* that the lessor was responsible." *Cooley, C. J.,* in *Powers v. Harlow,* 51 Am. Rep., 154, 160.

It is useless to cite further cases. The bare statement of the above facts is the statement of gross negligence. *Res ipsa loquitur.* Without such negligence on the part of the defendants, the plaintiff would not have been injured. McGhee would not have fired if he had had any reason to suppose there was any dynamite stored in such close proximity to the public road and passing trains on the railroad. The want of any notice, the six months' absence of the owners of the dynamite, and the completion of the railroad work in which it had been used were enough to put him off his guard. But even if McGhee was guilty of negligence, the negligence of the defendants concurred in producing the injury, and both are liable to the plaintiff.

W. P. OLDHAM v. SARAH M. RIEGER, ADMINISTRATRIX, AND MOODY B. MINTZ, ADMINISTRATOR OF A. W. RIEGER.

(Filed 28 October, 1908.)

1. **Judgments—Justice's Jurisdiction—Judgment Docketed in Superior Court, Suit on.**

   A judgment obtained before a justice of the peace and docketed in the Superior Court (Revisal, sec. 1479) becomes a judgment of the latter court only for the purposes of creating a lien and having execution issued thereon. Therefore an action can be brought on a justice's judgment, thus docketed, only in a justice's court, and must be commenced within the period limited on judgments of that court.

2. **Same—Executors and Administrators.**

   An action in the nature of a creditor's bill, brought in the Superior Court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judgment of a justice of the peace, and is barred if not commenced within the time limited.

ACTION heard on case agreed, by *Long, J.*, at March Term, 1908, of BRUNSWICK.

This is an action in the nature of a creditor's bill, brought by the plaintiff in behalf of himself and all other creditors of A. W. Rieger, deceased, against the defendants, his administrator and administratrix. The plaintiff, W. P. Oldham, alleges that he recovered a judgment against A. W. Rieger before a justice of the peace on 14 December, 1895, which was docketed in the Superior Court the same day, and that he requested the defendants to pay the same, which they refused to do; that the judgment has not been paid. He asks for an accounting by the defendants of their administration and the payment of the said judgment, or its ratable proportion, out of the assets in the possession of the defendants. The defendants answered and averred that they had duly notified creditors of their intestate, by advertisement, to present their claims, and that no claim has ever been presented to them. They also pleaded the statute of limitations. The

case was heard in the court below upon a case agreed, which is as follows:

1. A. W. Rieger, of Brunswick County, died intestate on 3 December, 1903, and on 8 December, 1903, the defendants duly qualified according to law as his administrator and administratrix.

2. On 14 December, 1895, the plaintiff brought suit before a justice of the peace of New Hanover County against A. W. Rieger and obtained judgment against him on said date, and on 16 December, 1895, the plaintiff caused a transcript of said judgment to be docketed on the judgment docket of the Superior Court of New Hanover County, and on the same date caused a transcript of said judgment from the Superior Court of New Hanover County to be docketed on the judgment docket of the Superior Court of Brunswick County, which judgment has not been paid.

3. The summons in this action was issued on 16 June, 1906.

4. There has been no final account filed by the defendants in settlement of their intestate's estate.

It is agreed that if upon the foregoing facts the court should be of the opinion that the claim of the plaintiff is barred by the statute of limitations, judgment is to be entered for the defendants, and if not, then for the plaintiff.

Upon the facts admitted, the court, being of the opinion that the plaintiff's judgment is barred by the statute of limitations, rendered judgment in favor of the defendants according to the agreement of the parties. The plaintiff excepted and appealed.

Empie & Empie and *Meares & Ruark* for plaintiff.

No counsel for defendants.

WALKER, J., after stating the case: This Court has held in numerous cases that the judgment of a justice of the peace

which has been duly docketed in the Superior Court becomes a judgment of the latter court, under the statute (Revisal, sec. 1479), for the purpose only of creating a lien and of having execution issued thereon within the same time as is limited for judgments originally recovered in that court. *Ledbetter v. Osborne,* 66 N. C., 379; *Hutchison v. Symons,* 67 N. C., 156; *Birdsey v. Harris,* 68 N. C., 92; *Adams v. Guy,* 106 N. C., 275; *Morton v. Rippy,* 84 N. C., 611; *McIlhenny v. Trust Co.,* 108 N. C., 311. The subject is fully discussed by *Justice Dillard* in *Broyles v. Young,* 81 N. C., 315, which has been considered in the more recent decisions of this Court as settling the true construction of the statute. The plaintiff in the judgment may move at any time within the ten years after the docketing of the judgment in the Superior Court for the issuing of executions thereon, upon notice to the adverse party, where execution has not issued within three years. But this is not a motion for execution to be issued, but an action upon the judgment itself. An action cannot be brought upon the judgment docketed in the Superior Court, for that is a judgment only for the purpose of lien and execution. It is not a new and independent *causa litis.* When it becomes necessary to sue upon the judgment, the action must be brought upon the judgment of the justice. In *McIlhenny v. Trust Co.,* 108 N. C., at p. 314, the Court, after reviewing the authorities, says: "At the time this action began, more than ten years had elapsed next after the judgment was docketed. The judgment was barred after the lapse of seven years from its date, and the right to enforce it by execution (issuing from the Superior Court) or otherwise was barred after the lapse of ten years next after the time it was docketed."

But the case of *Daniel v. Laughlin,* 87 N. C., 433, is decisive of this case, it being a decision upon the very question presented by the facts which have been admitted by the parties. It was a creditor's suit, as this action is, and one

of the plaintiffs declared upon two judgments of a justice of the peace, which had been rendered more than seven years before the action was commenced and also docketed in the Superior Court. The Court held that, as it was an action upon the judgments and not merely a motion for executions, the seven-years statute applied and barred a recovery of the claim. *Justice Ruffin* thus states the law: "We do not understand counsel who argued the plaintiff's exceptions in this Court to insist very earnestly upon them. Nor can we ourselves perceive any error in the ruling of the court below. The statute fixes the limitation to actions upon judgments rendered by justices of the peace at seven years in language so plain and positive that it leaves nothing open for construction; and, notwithstanding the fact that the judgments declared on in this case had been docketed, they continue to be the judgments of the justice for every purpose and intent save those of lien and execution, and as much subject to the limitations prescribed for such judgments as though no transcript of them had ever been forwarded to the Superior Court."

Counsel have asked us to reconsider that decision and reverse the principle as therein declared, but we must decline to do so, as we think the case was correctly decided. An inspection of the pleadings in this case will reveal the fact that the action is brought directly upon the judgment. It is true the plaintiff seeks to enforce its payment out of the assets—personal assets, we assume, as no other kind are mentioned—in the hands of the administrators, but the relief so sought by the plaintiff does not change the character of the action as being one upon the judgment. It may well be added that the judgment upon which this suit was brought was barred by the seven-years statute at the time of the intestate's death. Can it be that it has been revived by his death, so that the plaintiff now occupies a better position with respect to it than he did before? We think not. What *Justice Ruffin* says

in *Daniel v. Laughlin,* 87 N. C., at p. 436, with reference to Battle's Revisal, ch. 45, sec. 40 (Revisal of 1905, sec. 87), is a full answer to the question.

The decision of the court upon the case agreed was correct and is sustained.

Affirmed.

SUMRELL & McCOY v. INTERNATIONAL SALT COMPANY ET AL.

(Filed 28 October, 1908.)

1. **Contracts, Interpretation of—Sale of Goods Delivered—Pleadings—Allegation and Proof—Evidence.**

An accepted offer by letter of vendor for goods to be delivered sometime in October or November, at vendee's option, at a certain price, further stated that a definite time for delivery could not be fixed, owing to the uncertainty of water transportation. In a letter of acceptance the vendee requested that shipment be made between November 1st and 10th. It was agreed that shipment should be made by vessel. Vendee sued for damages arising from delay, alleging delivery was to have been made between November 1st and 10th. The correspondence was in evidence and no amendment of complaint was requested: *Held,* (1) there was a fatal variance between the allegation and proof; (2) there was no definite time fixed in which the goods were contracted to be delivered.

2. **Contracts—Sale of Goods Delivered—Indefinite as to Time of Delivery—Pleadings—Allegation and Proof.**

When it is stated by vendor, in the course of the correspondence establishing a contract for the sale of goods at a price delivered by vessel, that vessels were scarce, but he would be on the outlook and ship at the earliest possible moment, and nothing appears to indicate that the contract of sale was made upon a different basis, in an action for damages alleged to have accrued on account of delay, it was necessary for vendee to allege and prove, to sustain his action, that the first available vessel was not used by vendor for the shipment.

HOKE, J., dissenting.

ACTION tried before *Biggs, J.*, and a jury, at November Term, 1907, of LENOIR.

The plaintiff sues to recover damages for an alleged breach of contract made by defendant to sell and deliver a cargo of salt. The contract was made by correspondence, all of which is set out in the record. The plaintiffs are copartners, conducting a mercantile business in the town of Kinston. The defendant is a corporation, doing business in the State of New York, engaged in the manufacture and sale of salt, having a branch office in the city of Savannah, Ga. Plaintiffs allege that on 11 June, 1906, the defendant contracted to sell to them 250 tons of salt for the sum of $1,817.80, and to deliver the same "at the city of New Bern, between the first day of October, 1906, and the first day of November, 1906"; that defendant failed to deliver said salt "in accordance with its contract"; that plaintiffs were ready, able and willing to receive and pay for said salt in accordance with the terms of the contract; that by reason of the failure of defendant to deliver the salt plaintiffs sustained $500 damages. Defendant denied that it contracted to sell and deliver to plaintiff at New Bern the salt at the time alleged. It also denied that plaintiff has sustained any damage by reason of its action in the premises. Two issues were submitted to the jury:

1. "Was the contract, as alleged in the complaint, made between the parties; and, if so, was there a wrongful breach of said contract by the defendant?"

2. "What damages have the plaintiffs sustained thereby?"

Upon the conclusion of the evidence his Honor stated that he would instruct the jury to answer the first issue "No" and the second "Nothing." Plaintiffs excepted, submitted to a judgment of nonsuit and appealed.

Wooten & Clark, E. R. Wooten and *Shepherd & Shepherd* for plaintiffs.

Loftin, Varser & Dawson for defendant.

CONNOR, J. The contract relied upon by plaintiffs is evidenced by the correspondence between the parties, and the

answer to the first issue depends upon the construction of the letters. It appears that defendant's salt works were located at Scranton, from which place the salt was brought through the canal to New York, and shipped from there by schooner to New Bern. There is no suggestion that it was to be shipped by rail. H. H. McKoy, one of the plaintiffs, testifies: "Dealings are in writing, by letter, * * * which was the contract." The first letter introduced from defendant, dated 14 May, 1906, addressed to plaintiffs, acknowledges receipt of a letter asking for quotations, which are enclosed "f. o. b. Schooner New Bern. * * * We could make the delivery of the salt to you sometime in October or November, at your option, though you understand that, by reason of shipment moving by water, an exact date could not be guaranteed on which it would arrive at destination." On 1 June, 1906, plaintiffs wrote defendant: "Referring to your quotations, 14 May, * * * you can enter our order for one cargo, 250 tons, to arrive at New Bern about November 1st to 10th, 1906." June 11, 1906, defendant wrote plaintiffs: "Replying to your favor, 1 June, we have, as requested, entered your order for one canal-boat load of salt, say approximately 240 to 250 net tons." It will be noted that plaintiffs allege that this letter closed the contract. There was a proposition to buy by plaintiffs, and acceptance to sell by defendant. If the case is to turn upon these two letters, plaintiffs have failed to make good their allegation that the contract was to deliver the salt "between the first day of October and the first day of November, 1906." The proposition made by plaintiffs, 1 June, and accepted 11 June, 1906, was that the salt should "arrive at New Bern about November 1st to 10th, 1906." It is clear that this gave to the defendants until the last day named, 10 November, 1906, to deliver the salt.

The breach alleged is that defendant "failed to deliver said salt as it had contracted to do." It is elementary that a plaintiff may not declare upon one contract and, without amend-

ment, recover upon another. If the rules of pleading were otherwise, a defendant would never be able to prepare his defense. If upon the introduction of the letter the plaintiffs had asked permission to amend the complaint to correspond with the terms of the contract, his Honor would, as a matter of course, have allowed them to do so. As said by *Pearson, C. J.*, in *Shelton v. Davis,* 69 N. C., 324, "Under the Code, a plaintiff may sue for a horse and recover a cow; but in order to do this, when the variance appears, the plaintiff must obtain leave to amend by striking out 'horse' and inserting 'cow.'" It is said in *Parsley v. Nicholson,* 65 N. C., 207: "Every material allegation in the complaint which is denied by the answer must be sustained in substance by proofs." This has been uniformly held by all courts in which any degree of certainty in pleading is required. It can hardly be contended that a contract to deliver salt on 1 November, 1906, is shown by proving one to deliver on 10 November, 1906, any more than a cause of action on a note alleged to be payable on 1 November would be sustained by showing a note due 10 November. In either case the variance must be cured by an amendment.

Passing by this view of the case, we do not think that, in the light of all of the correspondence prior and subsequent to 11 June, a contract to deliver, either on 1 November, 10 November or at any other definite time, is shown. The letter of 14 May, 1906, calls attention to the fact that "an exact date could not be guaranteed on which it would arrive at New Bern." On 1 September the plaintiffs write defendant that they wish the order entered "to arrive at New Bern about 15 October." On 3 September defendant replies, from Savannah, Ga., that it had ordered shipment about 15 October, saying: "It may be necessary to ship this a little earlier, on account of conditions of freight on the canal, but the difference in time will not be enough to inconvenience you." On 5 September plaintiffs answer that they want the salt shipped,

instead of 15 October, in time to arrive at New Bern 15 October, or as near that date as possible. On 6 September defendant writes that instructions had been sent to make shipment, "so that, if a vessel for New Bern could be readily obtained, the salt should reach there by about 15 October. You understand that it is not possible to say definitely that a shipment by schooner will arrive on any particular day, but we will come as near to the date desired by you as we can." On 5 October plaintiffs write to inquire whether the salt had been shipped: "If not shipped, please do so at once." October 8, defendant answers that the salt has not been shipped, "but we are keeping right after the works, and as soon as a schooner is secured to go to New Bern your salt will be shipped on her. You understand there are only a limited number of vessels sailing from New York to New Bern, and it is not always possible to secure one promptly, but our people are on the lookout and will ship your salt at the earliest possible moment." On 16 October plaintiffs write defendant that they hope "you have been able before now to ship our salt, as our trade is already needing and wanting it. Giving you an assortment as early as we did, we did not anticipate but that you would be able to get it to New Bern by 1 November anyway, and we sold accordingly, hoping it would be there by 15 October, which was the time specified. Kindly do the very best for us, as we are needing it." On 30 October plaintiffs again write defendant, saying: "We thought that surely you would get it to New Bern by 15 October and, allowing two weeks for slow time, it would have placed it there 1 November. We sold it to our trade for delivery between 15 October and 1 November, and they are all waiting for same, *yet at this time we have no guarantee* from you that it will be shipped before Christmas." Defendant wired 7 November to plaintiffs: "Have wired Scranton for definite information regarding your shipment. Will advise promptly as possible." On same day plaintiffs write defendant, complaining of the delay, and

stating that they had sold to customers, etc. On 13 November defendant answers: "Our people have done everything they could to get your salt off, and, as previously advised, the reason for the delay is that they have been unable to get schooner in which to forward salt to New Bern." There was other correspondence of very much the same character, resulting in a cancellation of the order by plaintiffs 4 December, 1906. Treating the contract as closed by the letter of 11 June, 1906, and the other letters as evidence throwing light upon the language used in the letters of 1 June and 11 June, we concur with his Honor that no contract is shown by which any definite day was fixed upon for the arrival of the salt in New Bern. Every letter by both parties recognized the fact that the salt was to be shipped by schooner from New York to New Bern, and that defendant was to ship on the first schooner which could be secured for that purpose. The liability of defendant was to ship by the first available vessel or schooner, and not an unconditional promise to deliver on any definite day. If plaintiffs had alleged and shown that a vessel or schooner did in fact sail, or, by proper diligence on the part of defendant, could have been secured to carry the salt from New York to New Bern, they would have been entitled to recover such damages as they showed they sustained by such failure on the part of defendant. The defendant, in every letter, both prior and subsequent to 11 June, calls attention to the fact that the time of the shipment is dependent upon securing a vessel. On 13 November, referring to the complaint of plaintiffs that the shipment has been delayed, it writes: "It is not within our power to make any definite promise as to the date." Plaintiffs write on the same day: "Since 1 September it seems to us that you could have secured tonnage for New Bern, as it seems you have done for other people." These letters are all introduced by plaintiffs. They clearly establish a contract to ship the salt by the first schooner which could be secured sailing from New

York to New Bern. The plaintiffs prefer to allege and rely upon an unconditional promise "to deliver at New Bern between 1 October and 1 November, 1906," but they fail to show that any such contract was made or that any contract was made binding defendant to deliver at New Bern on any definite day. There is no allegation that a schooner or vessel sailed from New York to New Bern between 1 October and 1 November, or that by reasonable diligence defendants could have secured one. The entire correspondence shows that, while plaintiffs "anticipated" that the salt would arrive, and acted upon such anticipation, they did not claim or suggest that there was an unconditional promise to deliver on any day. They complained of the delay, suggested negligence on the part of defendant in making the shipment, and urged that shipment be made; but defendant, in reply, repeatedly said: "You understand that it is not possible to say definitely that a shipment by schooner will arrive on any particular day," etc. To this plaintiffs made no other reply than to urge shipment. Upon a careful examination of the entire correspondence, we concur with his Honor that no such contract as that alleged in the complaint has been shown. This renders it unnecessary to consider the exception to his Honor's ruling upon the second issue. The judgment must be

Affirmed.

HOKE, J., dissenting: I differ from the Court in the disposition made of this case, and am of opinion that, on a perusal of the entire correspondence and the parol evidence relevant to the inquiry, there has been a breach of contract established on the part of defendant company, and that the order dismissing the action as on judgment of nonsuit is erroneous.

The first letter on part of plaintiffs, of date 1 June, is, in substance, that "You can enter our order for one cargo of 250 tons of salt, to arrive at New Bern about November 1st to 10th, 1906. We, of course, will give you assortment later,

as we wish as long a time as possible to sell our trade and make up quantity of each kind."

On 11 June defendant answers: "Replying to your favor of 1 June, we have, as requested, entered your order for one canal-boat load of salt, say approximately 240 to 250 net tons. You can give us assortment any time up to 1 September, but the earlier you can give it, the better."

On 1 September plaintiffs write to defendant, giving the assortment referred to, to "arrive at New Bern about 15 October; 100 tons table salt, 100 3-pound bags table salt etc., etc. Please have same shipped care of Atlantic and North Carolina Company."

Defendant, replying to this letter, wrote as follows: "We have your valued favor of the 1st, with assortment for your boat load of salt, which we are to-day forwarding to the works, with instruction to ship about 15 October. It may be necessary to forward this a little earlier, on account of conditions of freight on the canal, but the difference in time will not be enough to inconvenience you," etc.

On 5 September plaintiffs wrote: "We are in receipt of your favor of the 3d, in regard to shipping date of our cargo of salt, and you have it wrong. Instead of shipping 15 October, we want it shipped from salt works in time to arrive at New Bern about 15 October or as near that date as possible."

Defendant replied, on 6 September, as follows: "We have your favor of the 5th, with reference to your order. We sent this in with instructions to make shipment, so that, if a vessel for New Bern could be readily obtained, the salt should reach there by 15 October. You understand that it is not possible to say definitely that a shipment by schooner will arrive on any particular day, but we will come as near to the date desired by you as we can."

There was quite an amount of correspondence after this date, the plaintiffs complaining of a failure on the part of

defendant to deliver the salt as per contract, and stating the disappointment and injury to plaintiffs and their customers incident to such failure, and defendant explaining why this was not done. But the letters set out indicated the contract between the parties, if there was one. The testimony further shows, that defendant, writing at different times in explanation of delay, had failed to deliver to plaintiffs any salt till date, 4 December, when the order was finally canceled. Here was an order for salt for use in the approaching winter season, placed in ample time and accepted for delivery on or about 15 October. If it be granted that some margin was contracted for, owing to the uncertainties attendant upon a shipment by water, the purpose and terms of the contract both gave clear indication that this margin was not to cover a period, at most, greater than two weeks, and that both parties so understood it. And by reason of this margin, too, the contract declared on is not required to be set out with the same exactness of statement as under other and different conditions. The uncertainty was rather in the delay usually incident to water shipment after it had commenced, and there was no indication given that the uncertainty of procuring a vessel for the purpose would in any way affect the time of delivery when the contract was entered into, or until after a delay in breach of such contract agreement had become manifest; and if it were otherwise, the margin allowed, as stated, was evidently not to extend to a period greater than two weeks.

The correspondence between the parties, after it became apparent that a delay would occur, will give some light on the matter, and tends to justify, I think, the position that there had been a wrongful delay on the part of defendant and in breach of its agreement.

On 5 October plaintiffs wrote as follows: "Kindly advise if our cargo of salt has been shipped, and if so, when it is due to arrive. If not shipped, please do so at once. Awaiting your reply," etc.

On 8 October defendant replied: "We have your favor of the 5th inst. Your salt has not yet been shipped, but we are keeping right after the works, and as soon as a schooner is secured to go to New Bern your salt will be shipped on her. You understand there are only a limited number of vessels sailing from New York to New Bern, and it is not always possible to secure one promptly, but our people are on the lookout and will ship your salt at the earliest possible moment."

On 16 October plaintiffs wrote: "We trust you before now have been able to ship our salt, as our trade is already needing and wanting same. Giving you the assortment as early as we did, we did not anticipate but that you would be able to get it to New Bern by 1 November, anyway, and we sold accordingly, hoping it would be there by 15 October, which was time specified. Kindly do the very best for us, as we are needing it."

On 30 October plaintiffs wrote as follows: "On 1 September, when we gave you assortment for our cargo of salt, we thought that surely you would have ample time to get it to New Bern, N. C., by 15 October, and, allowing two weeks for slow time, it would have placed it there on 1 November. We sold it to our trade for delivery between 15 October and 1 November, and they are all wanting same, yet at this time we have no guarantee from you that it will be shipped before Christmas, which you can readily see is placing us in an embarrassing position to our trade. Some of our competitors take pleasure in telling the trade that we would not be able to deliver the salt, and at the present time this is true, although it is no fault of ours. We will thank you to give us some definite information promptly, in order that we can tell our trade when they may expect the salt. We would also appreciate it if you would advise us if you have already shipped any cargoes to New Bern, because, should our trade supply themselves, we would then have no output for the

quantity bought from you. As this is very important to us, we trust you will give us full information promptly."

On 7 November defendant wired plaintiffs: "Have wired Scranton for definite information regarding your shipment. Will advise as promptly as possible."

On 7 November plaintiffs wrote defendant as follows: "We wrote you some days ago in regard to our cargo of salt, and as yet have no reply, and we wired you to-day as follows: 'Wire something definitely concerning arrival our cargo salt: important'; which we now confirm and await your prompt reply. We are very much surprised, at this late day, not to have any notice of shipment, for if it now has to be shipped and take several weeks it will arrive too late for our trade, as all are now wanting and needing salt, and you certainly have placed us in an embarrassing position. Other people have had salt to arrive at New Bern, and in fact we were notified to-day from New Bern that ours had arrived, and went around and told our customers it would be here in a few days, and later we were advised that it was for T. W. M. & Co. Certainly, buying at the early date we did, and then giving specifications on 1 September, it is strange that others should receive theirs before we do; and after our trade have bought elsewhere we will then have no use for the salt. It cost us considerable time and money to sell this cargo; and after having done so, it is hard to have to disappoint our trade, besides losing the profit, and we must say that it does not seem to us as if we have been given a square deal. We trust you will favor us with a prompt reply, fully explaining."

As heretofore stated, I am of opinion that this correspondence and the parol testimony relevant to the inquiry clearly show that there was a breach of contract on the part of defendant company, calculated to work the plaintiffs substantial wrong, and that the matter should have been submitted to the jury for decision.

JOHN PORTER, H. B. PORTER AND C. B. PORTER v. ABERDEEN AND ROCKFISH RAILROAD.

(Filed 28 October, 1908.)

Railroads—Rights of Way—Ejectment—Parties—Permanent Damages—Pleadings.

In an action for damages against a railroad company for unlawfully entering upon lands of plaintiffs and wrongfully occupying them for a right of way, it appears that one of the plaintiffs had, previously to the commencement of the action, conveyed the land to his coplaintiffs, who reconveyed it to him thereafter; further, that the company had entered on, constructed and was operating its railroad on the *locus in quo*. The plaintiffs, who were the owners of the land at the time of the commencement of the action, filed no complaint: *Held*, (1) damages for the entire wrong—past, present and prospective—should be had in one action, and on payment thereof by the company an easement passed to it, as in proceedings in ejectment; (2) it was necessary to retain all the parties to the action in order to protect the defendant from other and further recoveries for the same cause, though the court would not compel those of the plaintiffs who had not done so to file complaints; (3) the company could not be ousted by an action of ejectment.

ACTION tried before *Long, J.*, and a jury, at April Term, 1908, of CUMBERLAND.

The action was to recover damages against defendant company for unlawfully entering upon lands of the plaintiffs and wrongfully occupying same in the exercise of a right of way. The plaintiffs H. B. and C. B. Porter, having failed to file any complaint, the action as to them was dismissed and the cause proceeded with as between plaintiff John Porter and the defendant. Said plaintiff developed his case and offered evidence tending to show that he was the owner and in possession of the land at the time of the alleged unlawful entry thereon, and that he owned and was in possession of same at the time of trial. It further appeared that said plaintiff had no title to the land in question at the time the action was instituted, to-wit, on 18 August, 1904, having at that time conveyed the portion of land affected by defendant's

entry and occupation to his sons and coplaintiffs, H. B. and C. B. Porter, who reconveyed to their father, John Porter, after the action was instituted.

When it was disclosed, on the cross-examination of plaintiff John Porter that he had no title to the land at the time of action instituted, the cause was dismissed by the court, the judgment entered being as follows: "This cause coming on to be heard at this term of the court, before the court and a jury, and it appearing from the testimony and evidence introduced by plaintiffs that at the time of the institution of this action H. B. Porter was seized and possessed of one part of the land described in the complaint, and that C. B. Porter was seized and possessed of another portion of the land described in the plaintiffs' complaint, being the lands occupied by defendant for its roadbed and right of way, and that the plaintiff John Porter was not at the time of the commencement of this action seized or possessed of any portion of the strip of land described in the complaint; and it further appearing that no complaint was ever filed in this action by said H. B. Porter or by C. B. Porter, who were joined as parties plaintiff in the summons, it is now, on motion of Robinson & Shaw, attorneys for defendant, considered and adjudged that this action be dismissed as to H. B. Porter and C. B. Porter; and it further appearing that since the commencement of this action the said H. B. Porter and C. B. Porter have conveyed said land to the plaintiff John Porter, who was not seized or possessed of the same at the time of the commencement of this action, it is further considered and adjudged that this action be dismissed as to the plaintiff John Porter, and that the defendant, the Aberdeen and Rockfish Railroad Company, go hence without day and recover of the plaintiffs and the sureties upon their prosecution bond the cost of this action, to be taxed by the Clerk."

Plaintiffs excepted and appealed.

Sinclair & Dye, J. Sprunt Newton and *C. W. Broadfoot* for plaintiffs.

Robinson & Shaw for defendant.

HOKE, J., after stating the case: While the facts are not fully developed, we think, from a perusal of the pleadings and the evidence stated in the case on appeal, it appears by fair intendment that in 1902 the defendant company entered on the lands in question, claiming the right to do so, and have constructed their railroad and are operating the same, under and by virtue of a legislative charter; and on facts substantially similar we have held, in *Beasley v. Railroad,* 147 N. C., 362, that, under the circumstances indicated, a railroad company cannot be ousted from the land by action of ejectment on the part of the owner nor subjected to successive and repeated actions of trespass; but the remedy for the wrong, if one has been committed by the entry and occupation of the land, is to be redressed by an award of permanent damages. On a former appeal in that same cause, reported in 145 N. C., 272, *Connor, J.* (on page 278), speaking to this same question, delivered the opinion of the Court, as follows: "The plaintiff is entitled to recover of defendant a fair compensation for the injury done his land by entering upon it and constructing the railroad. When this is fixed and paid, the defendant will acquire the easement to use the land in the same manner, for the same purpose and to the same extent as if it had acquired the easement by condemnation."

It was formerly held, as indicated in Beasley's second appeal, reported in 147 N. C., 362, that where the damages suffered by the owner would be included under an assessment in condemnation proceedings, and such a method of redress was provided by the charter or the general law, such method should be pursued. This was so held chiefly for the reason that it was considered unwise and improper that an enterprise of this character, in which the public as well as

the stockholders had a vital interest, should be harassed and hindered and have its success jeopardized by numerous and repeated actions, when full redress could be afforded in one and the same proceeding. At the time of those decisions such a result could only be reached by condemnation proceedings, provided usually by charter or the general law. Since the same result is now accomplished by confining the owner, when suit is brought for the injury done, to recovery of permanent damages for the entire wrong, there is no longer any reason why either method of redress should not be pursued. The intimation to the contrary, therefore, in Beasley's second appeal may be considered as withdrawn.

Again, it was held in Beasley's second appeal that while the term "permanent damages" includes damages for the entire injury done the property—present, past and prospective—there is no good reason why this amount should not be ascertained by a verdict on different issues, when occasion requires that such a course should be taken. And it is further a well-recognized position with us that when there has been a wrongful entry and trespass on an owner's land, and such owner afterwards conveys the land to another, the right to recover for this wrong is personal to him who owned the land when the same was committed, and does not pass to the grantee. *Liverman v. Railroad,* 114 N. C., 692; *Drake v. Howell,* 133 N. C., 168.

A proper application of these principles to the facts presented requires that the order made by the Judge below, dismissing the action as to H. B. and C. B. Porter for want of a complaint, and dismissing the action of John Porter as on judgment of nonsuit, should both be reversed. The Court having decided that permanent damages, including recovery for the entire wrong—past, present and prospective—should be had in one action, and that on payment of such recovery an easement should pass to the road as in proceedings in condemnation, all who have an interest in the recovery, and

whose presence is necessary to protect the railroad from other and further recoveries for the same cause should be made and retained as parties. John Porter has an interest in such a recovery, and is a necessary party, both as being owner and in possession at the time of the original and wrongful entry and as present holder of the title, and H. B. and C. B. Porter are entitled to share in such recovery for the portion of the injury suffered while they were owners. The Court will not require them to file a complaint if they do not care to insist on their claim, but their presence in the suit is necessary to protect the defendant road from other and further litigation. When the road pays the permanent damages, the easement should pass, and, as stated, all whose presence is necessary to insure this result and protect the company from further action concerning it should be parties.

The order dismissing the action as to C. B. and H. B. Porter is reversed, and these persons will again become parties of record; and the order dismissing the action as on judgment of nonsuit is reversed, and the cause will be proceeded with in accordance with law.

Reversed.

R. H. GULLEDGE, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 28 October, 1908.)

1. Revisal, Sec. 59—Actions—Negligence—Killing—One Year—Condition Annexed—Limitations of Actions.

Under Revisal, sec. 59, giving a cause of action on account of the wrongful killing of intestate to the (executor) administrator or collector of decedent, the provision that suit should be brought within one year after such death is a condition annexed, and must be proved by the plaintiff to make out a *prima facie* case, and is not required to be pleaded as a statute of limitation.

2. Same—Controversy—Executors and Administrators—Collectors.
It is no excuse for plaintiff not bringing an action under Revisal, sec. 59, within one year, etc., to show that there was a controversy over the administration. A collector should have been appointed for the purpose of suit.

PETITION to rehear this case reported in 147 N. C., p. 234.

Robinson & Caudle, H. H. McLendon, J. A. Lockhart and *J. T. Bennett* for petitioner.

J. D. Shaw and *Murray Allen* for defendant.

BROWN, J. The petition of the learned counsel for the plaintiff, asking us to reconsider our decision in this case, seems to be based upon the idea that we have overruled a decision in which by some means the plaintiff had acquired a vested right. *Williams v. B. and L. Association*, 131 N. C., 267.

For the reasons so clearly stated by *Mr. Justice Hoke* in *Mason v. Nelson,* at this term, the plaintiff could acquire no vested right in such an adjudication as *Williams v. B. and L. Association,* had we in fact overruled it. We do not think we have modified, much less overruled it. In that case the Court was construing the usury statute of 1895 (chapter 69) containing provisions different from section 59 of the Revisal and does not bear upon the question involved in this case. Nor have we overruled *Meekins v. Railroad*, 131 N. C., p. 1, in which the original action was brought within one year after death. The plaintiff was nonsuited and brought his new action within twelve months after the nonsuit in the original action. This Court held that section 166 of The Code, authorizing the new action after nonsuit, applied to all cases. The present Chief Justice, speaking for the Court, says: "This statute (The Code, sec. 166) contains no exception of cases under section 1498 or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitations." *Best v. Kinston,* 106 N. C.

205, is cited and approved in that opinion. This is one of the cases cited in our opinion in this case wherein it is held by this Court that the one-year clause in section 1498 is not a statute of limitation, but a condition annexed to the cause of action, and that the plaintiff must prove that he has commenced his action within the time required by the act.

In view of the great weight of authority sustaining them, we do not feel justified in overruling the well-considered decisions of this Court which we followed in deciding this case. Those cases are supported by an unbroken line of decisions in other jurisdictions. Am. and Eng. Ency. Law (2d Ed.), Vol. VIII, p. 875, cites cases from a large number of States in support of the statement in the text, that "As the statutes confer a new right of action, no explanations as to why suit was not brought within the specified time will avail, unless the statutes themselves provide a saving clause."

Among the recent cases to the same effect will be found *Poff v. Telephone Co.,* 72 N. H., 164, citing *Taylor v. Iron Co.,* 94 N. C., 525; *Rodman v. Railroad,* 65 Kan., 652, citing same case; *Navigation Co. v. Lindstrom,* 133 Fed., 475, construing the New Jersey statute; *Williams v. Steamship Co.,* 126 Fed., 591.

This case last cited holds that no action based on the New York statute can be maintained after the time limited, "nor is the time extended to cover the appointment of an administrator." Judge Adams says: "The language of the act is explicit: 'Such an action must be commenced within two years after the decedent's death,' and, in view of the plain language, the time to commence an action cannot be extended by construction."

Cyc., Vol. XIII, p. 339, says: "Where the statute giving a right of action for death by wrongful act limits the time within which such action must be brought to a certain designated period, and contains no saving clause, an action

sought to be brought after the expiration of such period is barred, and no excuse will be recognized for such delay."

The text is supported by authorities from the States of Alabama, Iowa, Maine, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Virginia and Wisconsin.

Mr. Tiffany, in his work on Death by Wrongful Act, sec. 121, relies upon and cites the decisions of this Court in support of his text, wherein he says: "The limitation is not merely of the remedy, but is of the right of action itself," citing *Taylor v. Cranberry Iron Co., supra,* and *Best v. Kinston, supra.*

In the case of *Hill v. Supervisors,* 119 N. Y., 344, the Court of Appeals of New York says of this cause of action: "It must be evident that, as this action is brought under a special law and is maintainable solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all." See, also, *Eastwood v. Kennedy,* 44 Md., 563; *Oshields v. Railroad.* 83 Ga., 621; *Pittsburg v. Hine.* 25 Ohio St., 629; *Hanna v. Railroad.* 32 Ind., 112; *Rugland v. Anderson.* 30 Minn., 386. and Word on Lim., sec. 9.

In conclusion, we will quote from the Supreme Court of the United States. In the *Harrisburg case.* 119 U. S., 119-214, it is said: "The statutes create a new liability with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

In deference to the opinion of the learned gentlemen who certify that they think our decision was erroneous, we have given the matter careful consideration, and we quote some of the many authorities which sustain our judgment.

Petition Dismissed.

JAMES PATE, ADMINISTRATOR, v. TAR HEEL STEAMBOAT COMPANY.

(Filed 28 October, 1908.)

1. **Carriers of Passengers—Negligence—Declarations, Corroborative.**

When, in an action for damages claimed by reason of the negligence of defendant's employees while attempting to rescue a passenger on its steamboat who had fallen overboard as the boat was making her regular trip, the defendant proved by the one who was sent out for the purpose of rescue the good condition of the bateau being thus used, it was not error to admit, on behalf of plaintiffs, solely as impeaching evidence, subsequent declarations of this witness tending to show that the bateau was in a leaking condition and that another man would have been helpful in bailing it.

2. **Carriers of Passengers — Steamboats — Passenger Overboard — Rescue—Negligence—Evidence—Questions for Jury.**

After discovering the peril of a passenger who had fallen overboard into the water from defendant's steamboat while on her trip, it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of the ship and the other passengers, to rescue him; and evidence of negligence in the performance of this duty is sufficient to be passed on by the jury which tends to show unnecessary confusion and delay, that the bateau used was leaky and unfit and not properly manned, that there were no lights, and that with reasonable alacrity and proper help the boat might have reached the spot where the passenger sank in time to have saved him.

ACTION tried before *Long, J.*, and a jury, at April Term, 1908, of CUMBERLAND, to recover damages for the death of Hector Lloyd Pate, alleged to have been brought about by the negligence of the defendant.

The following issues were submitted:

1. "Was the death of the plaintiff's intestate caused by the negligence of the defendant, as alleged?" Answer: "Yes."

2. "Did the plaintiff's intestate, by his own negligence, contribute to his death?" Answer: "Yes."

3. "Notwithstanding such negligence on the part of said intestate, could the defendant, by the exercise of reasonable care and prudence, have prevented his death?" Answer: "Yes."

4. "What damages, if any, is plaintiff entitled to recover?" Answer: "One thousand dollars."

From the judgment rendered the defendant appealed.

Q. K. Nimocks, Sinclair & Dye and *Cook & Davis* for plaintiff.

Rose & Rose and *Robinson & Shaw* for defendant.

BROWN, J. It is unnecessary to consider any exceptions arising upon the trial bearing exclusively upon the first and second issues.

In consequence of the findings of the jury upon these issues, the plaintiff cannot recover, except upon the ground that, after discovering the peril of the plaintiff's intestate, the master and servants of defendant failed to make all reasonable efforts to rescue him.

The intestate was a passenger on defendant's steamer, "Tar Heel," from Wilmington to Fayetteville. When about eight miles up the river from Wilmington, at about 8 o'clock at night, when about to descend the stairway of said steamer, which was narrow and dark, with a sharp turn near the bottom and with a loose step which landed at the edge of the boat and within eighteen or twenty inches of the water's edge, the intestate accidentally fell overboard and was drowned.

That it was the duty of the master and crew to make every reasonable endeavor consistent with the safety of ship and passengers to rescue their passenger after discovering his

situation is properly admitted. But it is contended upon the entire evidence that there is nothing to show any dereliction of duty in this respect, and the court was requested so to charge.

His Honor thought otherwise, and submitted the question for the determination of the jury under the third issue.

1. We think the exception to the question asked Andrew Jackson upon cross-examination cannot be sustained.

The defendant had proven by Jackson the condition of the bateau sent from the steamer to the rescue of the intestate. Upon cross-examination the plaintiff was permitted to ask this question: Q. "Andrew Jackson, I want to ask you if, shortly after the drowning of Lloyd Pate, down at the river wharf at Fayetteville, you did not state to Mr. Frank Glover that you could have saved Lloyd Pate's life the night he was drowned if you had had another man in the boat with you to bail the water out of the boat." (Objection by defendant; overruled, and defendant excepts, the Court making its ruling, understanding that it is offered for the purpose of contradicting the witness and impeaching him.) A. "I do not remember whether I told him that way or not. I remember Mr. Glover asked me if the boat leaked any, and was there any water in it when I got back. I told him there was some water in it when I got back."

Of course, the declarations of the boat hand, made after the occurrence, are incompetent for the purpose of proving the dangerous condition of the bateau. *Southerland v. Railroad,* 106 N. C., 100. But, having been examined by the defendant as its witness as to the condition of the bateau, it was competent to impeach or contradict his evidence upon that point by his declarations on that subject to Glover. To lay the foundation for offering such impeaching evidence, it was proper to ask the witness on cross-examination the question objected to.

His Honor properly confined the scope and effect of the question to "impeaching evidence."

2. The evidence upon the question of a dereliction of duty in attempting to rescue the intestate is not very satisfactory, but upon a careful examination of the record we think his Honor properly submitted the matter to the jury under the third issue.

There is some evidence tending to prove unnecessary delay and confusion in the efforts to save the passenger after his peril was known, that the bateau was very leaky and unfit, that it was not properly manned, that there were no lights, and that with reasonable alacrity the boatman, with proper help, might have reached the spot where the passenger sank in time to have saved him.

The testimony offered for defendant tends to prove that every reasonable effort was made that could have been made, and that the bateau was well manned and in good condition.

This question is one eminently proper to be decided by a jury, under the circumstances of this case. His Honor's charge properly placed the burden of proof upon this issue upon the plaintiff, and clearly and fully submitted the question for their decision. Upon a review of the record we find

No Error.

J. T. DORTCH, ADMINISTRATOR OF GURNIE L. WIGGINS, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 October, 1908.)

1. **Issues, Sufficient.**

If issues are sufficiently definite to afford each party to the action opportunity to introduce all pertinent evidence and apply it fairly, they are as a rule unobjectionable.

2. **Railroads—Dangerous Spur Tracks—Negligence.**

It is the duty of a railroad company to keep its sidings and spur tracks in a reasonably safe condition for the traffic done over them; and when in the discharge of his duties an employee is killed by reason of a derailment of the car on which he was engaged, caused by the rails being out of alignment, a *prima facie* case of negligence is established.

3. **Railroads—Employer and Employee—Dangerous Spur Tracks—Moving Cars—Contributory Negligence—Proximate Cause.**

Contributory negligence on the part of deceased employee in not fastening the brakes to a car before endeavoring to couple it to the engine on a down grade spur track, and jumping upon the car in order to save it when it was in rapid motion, is not the proximate cause of his death, when it appears that the death resulted from a derailment, owing to the fact, unknown to deceased, that the rails were out of alignment.

4. **Same—Questions for Jury.**

While, ordinarily, jumping on or off a moving car is such contributory negligence as will bar a recovery for injuries received, it is for the jury to say whether a man of ordinary prudence would under similar circumstances have done so, when it appears that the car on which plaintiff was engaged in the course of his employment was derailed, owing to the unsafe condition of the spur track, unknown to him, and he jumped from it when he suddenly found himself in a dangerous position as it was leaving the track, though subsequent developments may show that he otherwise would not have been injured.

ACTION tried before *Biggs, J.*, and a jury, at April Term, 1908, of WAYNE, brought to recover damages for the alleged negligent killing of plaintiff's intestate while in defendant's service, on 7 March, 1907.

These issues were submitted:

1. "Was the plaintiff's intestate killed by the negligence of defendant, as alleged in the complaint?" Answer: "Yes."

2. "Did the plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer?" Answer: "No."

3. "What damages, if any, is the plaintiff entitled to recover?" Answer: "Five thousand dollars."

From the judgment rendered defendant appealed. The facts are sufficiently stated in the opinion of the Court by *Justice Brown.*

W. T. Dortch, Shepherd & Shepherd and *J. D. Langston* for plaintiff.

Aycock & Daniels for defendant.

BROWN, J. It is useless to comment on the exception to the refusal of the court to submit the issues in the form presented by defendant.

The issues as framed are sufficient to present to the jury every defense that has been made in this case or that is likely to be made in cases of this kind.

If issues are sufficiently definite to afford each party to the action opportunity to introduce all pertinent evidence and apply it fairly, they are as a rule unobjectionable. *Black v. Black,* 110 N. C., 398; *Pretzfelder v. Insurance Co.,* 123 N. C., 164.

The evidence in this case was all offered by plaintiff, and tended to show that plaintiff's intestate was conductor in charge of the switching train of the defendant at Rocky Mount on 7 March, 1907. He had a car of stone to be placed on the spur track for the use of the Rocky Mount Mills. There were two spur tracks there. The car of stone was to be placed on the spur track going down to the river. The stone car was shifted onto the spur track and left there a short time, while the other cars in the train were placed on the upper track.

Then the engine came back to couple to the car of stone. When the conductor left the car of stone he failed to tie the brakes. His attention was called to this before he attempted to couple, and he was told that in the event he missed coupling the car it would go into the river. Notwithstanding this, he attempted to make the coupling without fastening the brakes, saying that he could make the coupling. He scotched the car with wood and signaled the engineer to move back cautiously. The engineer did move cautiously, but the car, being on a curve, failed to couple, and the car jumped the wood scotch and moved a few feet. The conductor was again told to apply the brakes. He got some wood and scotched the train, but did not apply the brakes, saying that he would make the coupling that time. The second attempt failed, and the car jumped all the scotches, and by that time, to use the language of the witness, "had such momentum that no brake could have stopped it." The conductor and one of his brakemen jumped on the moving car to apply the brakes. Following the language of plaintiff's witness, "He did apply them, but the application did no good. I was watching him and the car at the time. Shortly after getting on the car, I saw a man, and he must have lost his head and swung out on the side next to the mill. Instantly the car jumped the track, and I heard Mr. Wiggins groan. I ran to his assistance and found him dead. He was between the car and the mill wall." The evidence tends to prove that the car was derailed some four or five car lengths from where it started, because one of the rails had been moved out of alignment and had been in that condition some eight or ten months. The rails lacked four inches of meeting at the point where the car jumped the track and where the intestate was killed. The spur track generally was in very bad condition. There is also evidence tending to prove that "if the car had not jumped the track the plaintiff's intestate would have been safe on top the car."

At the conclusion of the evidence the defendant moved to nonsuit. The court overruled the motion. Defendant excepted.

That the defendant is guilty of inexcusable negligence in allowing its track, although a spur track, to get into such dangerous condition, is not a debatable question.

If there is a duty which a railway company owes to its employees, as well as its passengers, it is to provide a reasonably safe track over which its engines and cars may be moved with comparative safety. Of course, we do not mean to hold that spur tracks shall be kept up to the same standard of excellence as the main line, but it is the duty of the company to keep its sidings and spurs in a reasonably safe condition for the traffic done over them. All the evidence shows that this track was in a desperately bad condition, and that the derailment of the car, which was the occasion of the intestate's death, was due to its defective state. At the very point at which the rails were four inches out of alignment the car left the track under such headway that brakes could not stop it. We are not confined here to a *prima facie* case of negligence evidenced by the fact of a derailment, but we have complete proof of a condition of track amounting almost to gross negligence, which caused a derailment resulting in death.

We have also evidence tending to prove that the intestate himself was guilty of negligence, first, in not fastening the brakes before undertaking to couple up the car, and, secondly, in jumping on the rapidly moving car with a view to stop its headway. The question is, What negligence was the proximate cause of his death? It is true that had the intestate not jumped on the car he would not have been killed, and there is a probability that had he tied the brakes the car would not have gotten from his control. The former, while reckless, was in the master's service and for its benefit, for he was endeavoring to save the car and its load from the river. The latter, while the part of wisdom, did not cause the derailment,

any more than the other. The plaintiff's intestate may have committed both acts of negligence and yet have lived uninjured, had the track been in reasonably good condition.

There is no such intermingling and co-operation of these alleged negligent acts of the intestate with the negligence of the defendant as to indicate that the intestate's negligence concurred with that of the defendant and helped to produce the derailment. 7 Am. and Eng. Enc., 374.

Of course, had the car not been derailed and had it gone overboard and had the intestate been drowned, the negligence of the defendant in maintaining so dangerous a track would not have been the cause of his death, but rather the intestate's own careless conduct. But it is incontestible that the defective track caused the derailment, and not the act of the intestate. We have no difficulty in concluding, therefore, that the negligence of the defendant was in any view of the evidence the proximate cause of the derailment.

The next mooted question is, Was the intestate at the time of the derailment guilty of contributory negligence in jumping from the car?

Ordinarily, of course, jumping on or off a moving car is such contributory negligence as bars recovery, and it is so held generally in the courts of this country. Hutchinson on Carriers, sec. 1177, citing many cases. *Browne v. Railroad*, 108 N. C., 34; *Burgin v. Railroad*, 115 N. C., 673.

But the principle does not apply here. Although the intestate risked life and limb in jumping aboard the car, he did it in the endeavor to save it from destruction. There is no evidence that he then knew of the gap in the track which caused the derailment. As to that, he had a right to believe that he was comparatively safe.

When he felt the rapidly moving car was leaving the track, he suddenly learned that he was in a position of great danger. As the sequel proved, it would have been safer not to jump, but under such conditions the law does not exact infallible

judgment, but only reasonable care and prudence. *Hinshaw v. Railroad,* 118 N. C., 1047.

The able and careful Judge who tried this case properly left that to the jury, when he instructed them: "If you find the derailment was caused by the bad condition of the track, but you also find that the plaintiff's death was caused by his act in attempting to get off the car while it was passing between the buildings, and that his conduct in this respect was negligent—that is, that he did not exercise the care that a man of ordinary prudence would have exercised under similar circumstances—then such conduct on his part would be the proximate cause of his death, and you should answer the second issue 'Yes.'"

Upon a careful review of the entire record, we are unable to find any error of which the defendant has just cause to complain.

No Error.

JONES-LANE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 October, 1908.)

1. **Carriers of Goods — Damage to Stock — Carrier's Possession — Liability as Carrier—Evidence—Burden of Proof.**

In an action against a carrier for damages to shipment of stock it was shown, without contradiction, that the carrier's agent could not find the consignee, and procured, without plaintiff's requesting it, a stable keeper to take care of the stock; that the stock was apparently in good order upon arrival, but the next morning one mule was dead—apparently had died from being trampled upon: *Held,* (1) the liability of carriers, as such, continues for a reasonable time after transportation ceases, and it was not error in the trial Judge to instruct the jury, if they believed the evidence, to find that the mule was injured while in the carrier's possession; (2) a *prima facie* case of negligence was made out against the carrier, and the burden was upon the carrier at least to introduce evidence tending to show it had discharged its duty.

2. Carriers of Goods—Reasonable Stipulations—Damage to Stock—Agreed Valuation.

A voluntary agreement by the shipper with the carrier, in consideration of a reduction in the rate of freight, that in case of loss or damage to the stock shipped the valuation thereof shall not exceed $100 a head, is valid as fixing in good faith a stipulated and reasonable value for a species of property of uncertain value, concerning which, in case of loss, the carrier would be without evidence.

3. Carriers of Goods—Damage to Stock—Notice of Claim—Reasonable Stipulations.

A stipulation in a contract of carriage that, in consideration of a reduction of freight rate for the carriage of stock, the consignee should give notice in writing of any claim for loss or damage to some officer of the carrier or its nearest station agent, before the stock is removed from its place of destination or mingled with other stock, is reasonable and just, intended to prevent fraud and imposition, and therefore valid, though unavailable as a defense in this case, as it is shown that the stock had not been removed from the carrier's possession.

HOKE, J., concurring, *arguendo;* CLARK, C. J., concurring with HOKE, J.

ACTION tried before *W. R. Allen, J.,* and a jury, at May Term, 1908, of CRAVEN, for the recovery of the value of one horse and one mule.

These issues were submitted to the jury:

1. "Was the horse in controversy delivered to the defendant?" Answer: "No."

2. "Was the mule in controversy injured while in possession of defendant?" Answer: "Yes."

3. "If so, was such injury caused by the negligence of the defendant?" Answer: "Yes."

4. "What damage, if any, is plaintiff entitled to recover?" Answer: "Two hundred dollars."

From the judgment rendered the defendant appealed.

W. D. McIver and *R. A. Nunn* for plaintiff.

Moore & Dunn for defendant.

BROWN, J. Plaintiff shipped a car load of horses and mules by defendant's railway to Washington, N. C. The jury have

found that one of the mules was injured, while in the defendant's possession, by its negligence.

We deem it necessary to notice only a few of the assignments of error.

1. The court charged the jury, if they believed the evidence, to answer the second issue "Yes." The testimony of defendant's agent at Washington establishes the fact that the car load of stock arrived about noon on 11 January; that the agent "could not find plaintiffs and procured Winfield (a stable keeper) to take care of the stock until they came in, in the next day or two." It appears that the stables of plaintiff are at Bath, a town some miles below Washington.

The agent further testifies that, when unloaded from the car, the stock was apparently in good condition. Lane testifies that he reached Washington next morning and then saw the stock at Winfield's stables; "one mule was dead; looked like he had been trampled and bruised." There is no evidence to the contrary.

We have recently held (in *Poythress v. Railroad,* at this term) that the liability of the carrier (as distinguished from that of a warehouseman) is continued after actual transportation ceases, for a reasonable time during which it remains liable as a carrier for the safety of the property entrusted to it.

Upon the principles laid down in the opinion in that case, and under the facts proven by defendant's agent, as well as Lane, the court did not err in the instruction given, for the mule was injured, if injured at all, while in the possession of the defendant.

There is no evidence in the record, that we can find, supporting defendant's contention in the brief that the stock was delivered to Winfield at plaintiff's request. It was stabled there, on account of the defendant, to give plaintiffs an opportunity to come in and receive it and pay the freight charges on it.

2. We find no error in his Honor's charge on the third issue. We have held in the case of *Jones v. Railroad* (at this term) that where there is proof that the animal was injured while in possession of the carrier a *prima facie* case of negligence is made out, so as to require the submission of the matter to the jury upon all the facts and circumstances in evidence.

The jury are not obliged to find that the carrier is guilty of negligence because the animal is injured while in its possession. The facts and circumstances in evidence may show that the animal was probably injured from other causes than the carrier's neglect of duty, and may cause the jury to exculpate the carrier. But proof of injury received while in the carrier's possession and under its care is sufficient to take the case to the jury, and throws upon the carrier the burden "at least of introducing evidence tending to show that it has discharged its duty." *Meredith v. Railroad*, 137 N. C., 487.

3. The defendant requested the court to charge the jury "that plaintiff's recovery in this action is limited to the value fixed upon the stock at the time it was offered and delivered for shipment, and, if you believe the evidence in this case, this valuation was fixed at $100 per head, and any recovery would be limited to $100 for each animal which may have been lost or damaged in transit." The court declined to give this instruction, and defendant excepted.

The consignor of the stock, acting for the plaintiff, elected to ship the stock under a bill of lading or shipping contract containing the following clauses:

"ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

"*Read this contract carefully.*

"NOTICE.—This company has two rates on live stock. Shippers of live stock will take notice that rates of freight and the extent of liability of the company are governed by the valuation which they place thereon. Rates of freight are on file and will be shown by agent on application.

"To the St. Louis and San Francisco Railroad Company:

"The undersigned offers for shipment over your road twenty-five head of horses and mules from Fort Scott, Kan., to Washington, N. C., each head of the estimated weight of .... pounds and valued at $100 per head, which valuation is named by me for the purpose of securing a reduced rate of freight on this shipment; and I agree that, in case of loss or damage to same, said valuation so named shall be conclusive, should I make any claim for such loss or damage against any carrier over whose line the same may pass. This application is an election on my part to avail myself of a reduced rate by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations.

"Witness: E. E. WALKER, Erwin Piper Horse and Mule Company.

"The St. Louis and San Francisco Railroad Company accepts this shipment and the above valuation as a basis for fixing the rate of freight thereon.

"ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,

"By E. E. SX. W. Agent.

"NOTE.—The rates of freight on live stock are fixed in view of the nature and extent of liability assumed by the carrier, and all kinds of live stock shipped in car lots under a contract similar to the following, limiting the liability of the carrier, are taken at reduced rates; all kinds of live stock will be taken at carrier's risk, if the shipper so elects, at rates provided by the existing tariffs, classifications and under the provisions and conditions relating thereto; and in either event no agent of this company has any power to bind it in any way, in regard to the shipment of live stock, except by written contract."

We have recognized the doctrine, held by nearly all the courts of this country, that a stipulation in a shipping con-

tract that in case of loss or damage the carrier shall not be liable beyond a fixed value agreed upon is valid, when freely and fairly entered upon and when the circumstances indicate that the stipulation as to value is reasonable or based upon a valuable consideration and is not an obvious evasion of the law upon the part of the carrier for the purpose of escaping, in large measure, liability for the consequences of its negligence.

This doctrine is clearly recognized by this Court in *Mitchell v. Railroad,* 124 N. C., 246; *Gardner v. Railroad,* 127 N. C., 293; *Selby v. Railroad,* 113 N. C., 588, and in *Everett v. Railroad,* 138 N. C., 74.

In the *Gardner case* the law is summarized as follows: "A common carrier can make a valid agreement, fixing the value of shipments in case of loss by its negligence, if such agreement be reasonable or based upon a valuable consideration, and it must clearly appear that such was the intention of the parties."

In the *Everett case* the contract was not upheld, as it was unreasonable, and was a plain attempt to escape practically all liability, as the property lost through the carrier's negligence was worth $250 and the valuation fixed upon in the bill of lading was only $30. Nevertheless, the opinion of the Court refers to contracts of the character of the one now under consideration and recognizes their validity. Page 74.

The same observation can be made as to the *Minnesota case,* frequently cited upon the question of the limited liability of carriers under special contract. In that case it is said: "Yet there is no reason why the contracting parties may not in good faith agree upon the value of property presented for transportation or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that

the requirements of the law be not evaded and its purposes frustrated, contracts of this kind should be closely scrutinized." *Moulton v. Railroad,* 31 Minn., 89. This statement of the law is sustained by text writers, as well as by innumerable adjudications in the Federal and State courts. Moore on Carriers, p. 349, sec. 31; Hutchison on Carriers, sec. 426, and note 42, where the cases from the Federal courts and twenty-one State courts are collected.

In this case there is no evidence whatever of a purpose upon the part of the carrier to evade liability for its own negligence. On the contrary, the manifest purpose is to agree upon in good faith a stipulated value for a species of property of very uncertain value, and concerning which, in case of loss, the carrier would be without evidence and consequently entirely at the mercy of the shipper.

The contract of shipment gave the owner reduced rates, which is a valuable consideration, and at the same time gave him the option to pay the full charges by law, without limit as to value. The shipper voluntarily chose the former, and he cannot now be allowed to repudiate his contract. That the agreed valuation per capita is reasonable and is not an evasion is manifest. In fact, it appears from the bill of sale of the stock that some animals are valued lower than the stipulated sum, one horse being valued as low as $80.

We are of opinion that his Honor erred in refusing the prayer for instruction.

4. It was agreed in this contract of shipment, in addition to the limited value clause, that, in consideration of the rate granted him as a condition precedent to his right to recover, the consignee would give notice in writing of his claim to some officer of said company or its nearest station agent before the said stock was removed from the place of destination or mingled with other stock. This provision of the contract is inserted for the protection of the carrier, to the end that when the stock has been delivered to the consignee at the

place of destination, if there is any injury or damage, the carrier may have an opportunity for examination before the stock is removed or mingled with other stock. It is a reasonable and just provision, intended to prevent fraud and imposition, and which has been distinctly upheld and enforced by this Court in *Selby v. Railroad,* 113 N. C., 594.

We do not think, however, that it will avail the defendant, under the facts of this case, for the animal, if injured at all, was injured while in the custody of the defendant and before delivery to the plaintiff.

Let the judgment of the Superior Court upon the fourth issue be set aside and the cause remanded to that court, with direction to enter judgment upon the other findings for the stipulated value of $100.

Error.

HOKE, J., concurring: It is the settled law of this State that, in the absence of legislative sanction, a common carrier, in its contract of shipment, cannot stipulate against recovery for a loss or damage occasioned by its own negligence, and it can make no such stipulation as to either a total or partial loss. Speaking to this question, in *Everett v. Railroad,* 138 N. C., 71, the Court said: "It is the law of this State, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss so occasioned. *Capehart v. Railroad,* 81 N. C., 438; *Gardner v. Railroad,* 127 N. C., 293. The same doctrine is very generally accepted in other jurisdictions. It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and at the same time permit and uphold a partial limitation which could avail to prevent anything like adequate and substantial recovery by the shipper. Therefore it is held that any limitation of liability by contract designed for the purpose is forbidden."

In the rare and exceptional cases when a carrier is allowed on recovery had for breach of contract of carriage of certain classes of goods, to limit the amount of such recovery to a value fixed and predetermined by the contract of shipment, the rule is, I think, correctly stated in *Everett's case,* as follows: "Such agreements are upheld where, the carrier being without knowledge or notice of the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate."

This rule is particularly applicable to shipments of stock in quantities, and eminently just to both parties to such contracts, affording to the shipper a fair and reasonable shipping rate and protecting the carrier from exorbitant and unconscionable recoveries by reason of excessive valuations which it had no opportunity to ascertain or to resist successfully and for which it has received no adequate compensation. But to permit or uphold such a contract, when the loss arises from negligence, all the conditions suggested must exist. The carrier must be without knowledge or notice of the true value the valuation must be the fair average valuation of property of like kind, and it must have been made the basis of a fair and reasonable shipping rate.

The rule, as stated, is given only by way of suggestion in *Everett's case, supra,* but is, I think, the principle to be deduced from many well-considered authorities on the subject, both decisions and approved text writers, some of them referred to in the opinion delivered in that case, among others *Gardner v. Railroad,* 127 N. C., 293. In my judgment, the second headnote of *Gardner's case,* cited with approval in the principal opinion, as follows: "(2) A common carrier can make a valid agreement, fixing the value of shipments, in case of loss by its negligence, if such agreement be reasonable, and based on a valuable consideration, and it must clearly appear

that such was the intention of the parties," is not a correct digest of the decision rendered by the Court, nor does it correctly express the rule applicable to the case now considered. In the opinion the Court thus refers to the question immediately under discussion: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence. *Mitchell v. Railroad,* 124 N. C., 236; *Hart v. Railroad,* 112 U. S., 331; *Phœnix Insurance Co. v. Erie & W. Transp. Co.,* 117 U. S., 322; *Liverpool & G. W. Steam Co. v. Phœnix Insurance Co.,* 129 U. S., 397; *California Insurance Co. v. Union Compress Co.,* 133 U. S., 387, 415; *Constable v. Steamship Co.,* 154 U. S., 51, 62. The measure of such liability is necessarily the amount of the loss; and if a common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost—that is, for only a small part of the loss—it is thereby exempted *pro tanto* from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts and nullify the settled policy of the law. We do not mean to say that there are no cases where a common carrier can make a valid agreement as to the value of the article shipped, but all such agreements must be reasonable and based upon a valuable consideration. Moreover, it must clearly appear that such was the intention of the parties," citing the case of *Hinkle v. Railroad,* 126 N. C., 932, 938.

It will thus be seen that the *decision* in *Gardner's case* was against the claim of exemption from liability for loss occasioned by the carrier's negligence, and that this second headnote, stated by the reporter as one of the points decided in that case, was only made by way of suggestion and should not be considered as authority for the position stated. On the contrary, it will appear, by careful examination of the

authorities referred to and others relevant to the subject, that the learned Justice had in mind contracts made by carriers against their common-law liability as insurers—an entirely different proposition—and his statement of such a proposition, in reference to stipulations against negligence, is inaccurate and to some extent misleading. See *Hinkle v. Railroad, supra; Capehart v. Railroad,* 81 N. C., 438.

The present case comes clearly within the rule stated in *Everett's case, supra,* and I therefore concur in the decision made, but have deemed it not improper to write a separate opinion, with a view of showing that the second headnote in *Gardner's case* is not a correct digest of that decision and should not be considered as the law applicable to contracts of this character.

AMERICAN NATIONAL BANK v. S. K. FOUNTAIN.

(Filed 28 October, 1908.)

1. Negotiable Instruments—Holder in Due Course—Fraud—Notice—Burden of Proof.

When it is shown that a negotiable instrument sued on has been procured by fraud, or there is evidence tending to establish it, it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it. (Revisal, secs. 2201, 2208.)

2. Instruments—Evidence—Burden of Proof—Questions for Jury.

When it has been established or there is allegation and evidence tending to show that a negotiable instrument was procured by fraud, in a suit by one claiming to be the holder in due course, it was error for the trial Judge, upon supporting evidence, to charge the jury that the *prima facie* case of the plaintiff was restored by his uncontradicted testimony; that he acquired the note in the usual course of business, before maturity and without notice of any vice in it, as the burden of proof thereof was upon plaintiff, and the question as to the issue and the credibility of the evidence thereon was one for the jury.

BANK *v.* FOUNTAIN.

ACTION tried before *Neal, J.*, and a jury, at November Term, 1907, of NASH.

The action was to recover the balance due on a promissory note for the purchase price of an automobile, given by defendant to one B. A. Blenner, and by said Blenner endorsed to plaintiff. The defendant resisted recovery on the ground that the note was procured by false and fraudulent representations on the part of Blenner, the vendor. The jury found that the note sued on was procured by misrepresentations and fraud on the part of Blenner, the vendor, and that the plaintiff was endorsee for value, before maturity, and without knowledge or notice of any infirmity affecting the validity of the note.

There was motion for a new trial, on exceptions properly noted, which was overruled. Defendant excepted. Judgment on verdict for plaintiff, and defendant excepted and appealed.

Bunn & Spruill for plaintiff.

T. T. Thorne and *Jacob Battle* for defendant.

HOKE, J. Our statute on negotiable instruments (Revisal, ch. 54, sec. 2201) defines a "holder in due course" as one who takes a negotiable instrument that is (*a*) complete and regular on its face; (*b*) before it was overdue, and without notice that it had been previously dishonored (if it had been); (*c*) in good faith, and for value; (*d*) and at the time it was negotiated to him he had no notice of any infirmity in the instrument or any defect in the title of the person who negotiated it. And section 2208 of the same chapter provides as follows: "That every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course," etc.

These sections of the statute are to a great extent a codification of certain general principles of mercantile law applicable to the subject, established by well-considered decisions of the courts in this country and England, notably, *Tatam v. Haslar*, 23 Q. B. Div., 1889, p. 345; *National Bank v. Diefendorf*, 123 N. Y., 191; *Vosburgh v. Diefendorf*, 119 N. Y., 357; *Giberson v. Jolly*, 120 Ind., 301, etc., etc.

There is some conflict of authority as to the extent and proper application of the burden which the law casts upon a plaintiff, where fraud has been established or when there has been evidence offered tending to establish it, which is thus referred to in Norton on Bills and Notes, 334: "In the cases of illegality the rule is the same, and for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show that he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that in addition to proving value the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud. If value and notice are disputed as facts, they must be passed upon by the jury." The author, in note 92, cites several additional cases in support of the text.

In *Tatam v. Haslar, supra*, it was held "that when fraud is proved, the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith, without notice of the fraud."

In *Vosburgh v. Diefendorf, supra*, it is held: "(1) Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a *bona fide* purchaser or that he derived his title from such a purchaser. It is not sufficient to show simply that he pur-

chased before maturity and paid value; he must show that he had no knowledge or notice of the fraud."

The statute, then, having enacted into a law the doctrine sustained by these authorities, the rule established by the statute must be observed, to the effect that when fraud has been established in procuring the note or in the title of any one who has negotiated the instrument the burden is on the plaintiff to show that he or some one under whom he claims acquired the title as a holder in due course—that is, that he acquired the title (1) before maturity, (2) in good faith and for value, (3) without notice of any infirmity or defect in the title of the person negotiating it. And where the facts established call for its application, the rights of the parties must be determined under the rule as to the burden of proof which the statute provides.

We are inclined to the opinion that the defendant was not given the full benefit of this principle in the charge of the court below; but if it should be conceded that, when taken in connection with the testimony offered, there was no reversible error in the respect suggested, certain it is that the charge erroneously invades the province of the jury in assuming, as it does, the truth of the evidence offered by the plaintiff on the essential facts of the transaction. Thus, after properly placing the burden on the plaintiff, by reason of evidence offered tending to establish fraud, the charge proceeds: "But the plaintiff having responded by showing that it acquired the note *bona fide* for value in the usual course of business and while it was still current, and before its maturity, the *prima facie* case of the plaintiff is restored." And again: "The court further charges you that the *prima facie* case of the plaintiff having been restored by the uncontradicted evidence of the president of the bank, that it acquired the note in the usual course of business, before maturity and without notice of any vice in it," etc.

It may be that when fraud is established in procuring the

instrument, or there was evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction, and it should thereby appear, with no evidence to the contrary and no other fair or reasonable inference permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity and without notice, the court could properly charge the jury if they "believed the evidence," or if they "found the facts to be as testified"—a more approved form of expression—they would render a verdict for plaintiff. But here, the fraud having been established or having been alleged, and evidence offered to sustain it, the circumstances and *bona fides* of plaintiff's purchase were the material questions in the controversy; and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it was for the jury and not for the court. *State v. Hill*, 141 N. C., 771; *Riley's case*, 113 N. C., 651.

As said by the Court in this last case, the "plea of not guilty disputes the credibility of the evidence, even when uncontradicted." His Honor below, therefore, had no right to say to the jury, on this very material question, "The *prima facie* case of plaintiff having been restored by the uncontradicted evidence of the president of the bank, that it acquired the note in the usual course of business, before maturity and without notice of any vice in it"; for this assumes that the statement of the president is to be taken as true, and withdraws that matter from the jury. The precise question was presented in the case of *Bank v. Iron Works*, 159 Mass., 158, and in that case it was held: "(1) In an action on a promissory note, which was defended on the ground that the note had been fraudulently put into circulation by the P. L. Co., a Massachusetts corporation, organized for the purpose of 'doing a brokerage business in commercial paper, stocks, bonds and other property,' from whom the plaintiff company acquired it, the plaintiff's officers testified that the note was taken by

them in good faith and for value, before maturity, and the defendant introduced no testimony to contradict these officers: *Held,* that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud."

The trial court was probably misled by the language of the opinion in *Bank v. Burgwyn,* 110 N. C., 273, making a quotation from Daniel on Negotiable Instruments, sec. 819, without adverting to the facts stated in the case on appeal, and it is in reference to such facts that a decision is to be considered authority, from which it appears that the trial court in that case had submitted the question of the *bona fides* of plaintiff's purchase to the jury, and had not undertaken to determine it, as was done in the present case. The statement of the law contained in this section of Mr. Daniel's valuable work on Negotiable Instruments, sec. 819, has been subjected to adverse comment in the decisions on the subject, which we have adopted as law by our statute, and there is doubt if, since the enactment of this statute, it can be regarded as correctly expressing the rule for trial of causes affected by this section of the statute in reference to the burden of proof.

As heretofore stated, when fraud is proved or there is evidence tending to establish it, the burden is on the plaintiff to show he is a *bona fide* purchaser for value, before maturity and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the Judge could charge the jury, if they believed the evidence, to find for plaintiff, the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury.

There will be a new trial, and it is so ordered.

New Trial.

INDEX.

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ABATEMENT.

1. *Plea—Nature of Plea.*—In pleas in abatement the facts upon which the plea rests must be stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted. *Emry v. Chappell*, 327.

2. *Same, Effect of.*—An abatement of a suit is a complete termination of it at law, and the abatement of the main action abates proceedings ancillary or collateral to it. *Ibid.*

3. *Pleas—Relief in Former Action, When Granted.*—When it appears that in a former suit pending between the parties the same relief can be afforded as in the present action, the latter action should be dismissed; and it is immaterial what the position of the respective parties on the record in the two suits may be, whether plaintiffs or defendants, if full relief can be had in the action first commenced. *Ibid.*

4. *Same—Partnership—Dissolution.*—In an action by one partner for dissolution of the partnership, on the grounds that he had been denied participation in the profits, and his partner was mismanaging the firm's affairs and converting its assets to his own use, the answer of the other partner alleged the pendency of a prior action against the firm, brought by a creditor of the firm, in which, by answer, he in effect demanded an accounting and dissolution and division of the surplus. All the parties to the former action agreed to a reference, including the taking and stating of an account between the defendants therein, with leave to file and amend pleadings, etc. In the present suit the Judge in the lower court passed upon the answer and evidence in the former suit, and found them to be as stated: *Held*, (1) the plea of former suit by answer in this action was a proper plea; (2) the plaintiff in this action can obtain the same relief in the former action, and have the necessary ancillary remedies which may be required to protect his interests pending the litigation, by proper application to the court; (3) it was error in the lower court to overrule the defendant's motion to dismiss in this action. *Ibid.*

ABATEMENT—*Continued.*

5. *Plea—Action Dismissed—Discretionary Powers of Trial Judge.* When in an action there is a plea of a former action, wherein the full relief demanded can be had, it is in the discretion of the trial Judge to stay further proceedings in the present action until an opportunity is given to correct the record in the former suit, so as to embrace further matters set out in the present suit, or he may dismiss, and require plaintiff to start anew after having the record in the other suit amended. *Ibid.*

ABUTTING OWNER. See Damages, 8.

ACCEPTANCE. See Bond Issues, 2; Negotiable Instruments, 5.

ACCEPTOR OF FREIGHT. See Carriers of Freight, 15.

ACTION FOR WRONGFUL KILLING. See Negligence, 17.

ADDITIONAL INSURANCE. See Insurance, 5, 7.

ADEMPTION. See Wills, 5.

AGRICULTURAL LIEN. See Vendor and Vendee, 1.

ALLEGATIONS AND PROOF. See Pleadings, 23, 24.

ALLEGATIONS, SUFFICIENT. See Pleadings, 12, 13.

AMENDMENT. See Pleadings, 10, 14, 16, 21.

APPEAL DISMISSED. See Injunctions, 4.

APPEAL AND ERROR.

1. *Former Decision—Rehearing.*—A matter of law determined on appeal will not again be heard on another appeal in the same case. The proper procedure is upon a petition to rehear. *Britt v. Railroad*, 37.

2. *Evidence—Exceptions, When Taken.*—Exceptions taken on the trial, but which are neither in the assignment of error nor grouped at the end of the case on appeal, nor mentioned in appellant's brief, are deemed as abandoned in the Supreme Court. *Ibid.*

3. *Facts Agreed—Exceptions—Procedure.*—On an appeal from a judgment rendered upon an agreed state of facts no exception or assignment of error is necessary, as the appeal brings up the entire record and is an exception within itself. *Mershon v. Morris*, 48.

4. *Procedure—Record.*—The appeal, provided by section 2587, from a judgment by the Clerk of the Superior Court in condemnation proceedings, under Revisal, sec. 2580, takes the entire record up for review upon questions of fact to be tried

APPEAL AND ERROR—*Continued.*

by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed. *Railroad v. Railroad*, 59.

5. *Condemnation—Clerk of Court—Findings of Fact not Final.*—The findings of fact of the Clerk upon preliminary allegations, under Revisal, sec. 2580, in condemnation proceedings, are not final, and may be appealed from. Revisal, sec. 2587. *Ibid.*

6. *Condemnation—Exceptions, How Taken.*—Upon proper denial of the matters alleged in the petition, exceptions to the Clerk's order appointing commissioners in condemnation proceedings may be of a general character, and, upon appeal, will present any question appearing upon the record. *Ibid.*

7. *Same — Brief — Abandoned, When.* — Exceptions appearing of record but not referred to in appellant's brief are treated as abandoned in the Supreme Court. Rule 34, 140 N. C., 666. *Ibid.*

8. *Condemnation—Nonsuit—Defendant's Rights—Procedure.*—In proceedings by one railroad company to condemn a right of way upon which another was lawfully constructing its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after having obtained an order, in the progress of the case, giving it exclusive possession and ejecting the defendant from the *locus in quo*. *Ibid.*

9. *Same—Answer—Interests Involved—Rights of Public.*—When a defendant railroad company in possession of the *locus in quo*, the subject of condemnation proceedings by another railroad company, has set up new matter in its answer involving its rights to its exclusive occupation thereof, alleging that large sums had been invested in the prosecution of its work thereon, and larger sums for investment are awaiting the termination of the controversy involving the construction of this important line of railroad, it is entitled to have its claim adjusted and settled, and it is for the public good that a settlement of the controversy be had, and plaintiff's motion for judgment of nonsuit was properly refused. *Ibid.*

10. *Excusable Neglect—Facts Found.*—The trial Judge should find the facts involved on appeal from his order setting aside, in his discretion, for excusable mistake or neglect, a judgment previously rendered. *Smith v. Holmes*, 210.

11. *Excusable Neglect—Legal Excuse Appearing in Record.*—When neither party to an appeal from an order of the trial Judge setting aside on reasonable terms a judgment previously rendered, on the ground of excusable mistake or neglect, has re-

APPEAL AND ERROR—*Continued.*

quested the Judge to find the facts, and it appears from the statement made of record by the Judge, and from other statements therein, that the case was tried in the absence of counsel, who had good cause to believe that the case would not be then taken up under the existing circumstances, the appeal will be affirmed. *Ibid.*

12. *Procedure—No Substantial Right Affected.*—When in the proceedings appealed from there was a slight technical deviation from the usual procedure in like cases, but there was no substantial irregularity therein or prejudice to appellant's rights, he cannot be heard to complain on that account. *Bradburn v. Roberts*, 214.

13. *Pleadings—Amendment—Discretion.*—The refusal of a motion to be allowed to amend pleadings is in the discretion of the trial Judge and not reviewable on appeal. *Coleman v. Coleman*, 299.

14. *Judgment — Nonsuit — Appeal Dismissed — Action Within One Year.*—Where there has been a judgment of nonsuit entered against a plaintiff upon the evidence, and an appeal taken to the Supreme Court which was not duly prosecuted and was dismissed under Rule 17, the judgment in the first action is not a bar to the second one, and the plaintiff may bring another action for the same cause within one year after the appeal in the first action has been dismissed. This is clearly so, if an additional cause of action is stated and no proof taken. *Lumber Co. v. Harrison*, 333.

15. *Costs of Superior Court—Final Judgment.*—With but a few exceptions, as, for instance, where continuances are granted upon agreements, or judgment, that a party pay costs, the costs of the Superior Court follow final judgment. *Smith v. Railroad*, 334.

16. *Same—Successful Appeal—Costs, an Offset to Final Judgment—Transcript and Certificate.*—When plaintiff recovers final judgment in the Superior Court after two successful appeals by defendant, the costs of all the trials in the Superior Court should be taxed against the defendant, but it is entitled to offset against the final recovery all the costs properly paid by it on its successful appeals, including the transcript and certificates. *Ibid.*

17. *Assignment of Error of Record—Appeal from Judgment.*—When the appeal calls in question only the correctness of the judgment, no summary of exceptions under Rule 19 (2) is required by Rule 21, because it is error on the face of the record. Otherwise a demurrer is sustained or overruled, for

APPEAL AND ERROR—*Continued.*

Revisal, sec. 475, provides that the demurrer shall distinctly specify the grounds of objection to the complaint. *Ullery v. Guthrie*, 417.

18. *Docketing Transcripts—Motion to Dismiss—Laches of Movant.* When, under Rule 5 of the Supreme Court, the appellant does not docket his appeal "seven days before the call of the district to which it belongs," and the appellee defers making the motion to dismiss until the call of the district has begun, and the transcript on appeal has then been docketed, the appellee has been guilty of laches, and his motion to dismiss will be denied. *Foy v. Gray*, 436.

19. *Referee's Findings of Fact—Evidence.*—The Supreme Court is bound by the findings of fact of the referee, sustained by the trial Judge, when there is evidence to support them. *Ibid.*

ASSIGNMENT OF ERROR. See Appeal and Error, 17.

BEQUESTS, SPECIFIC. See Wills, 3.

BOND. See Condemnation Proceedings, 12; Executors and Administrators, 1, 5.

BOND ISSUES.

1. *Mandamus—Town Commissioners—Acceptance and Approval—Ministerial Duties.*—A *mandamus* will only lie against the town commissioners to compel the consideration of a bond offered by the town treasurer, and not to compel them to accept and approve it, the commissioners being individually liable in taking one which they knew or should have known was insufficient. *Burke v. Commissioners*, 46.

2. *Quo Warranto—Officer Inducted—Tender of Bond—Judgment Revoked—Procedure.*—When an officer is in office by virtue of a judgment in *quo warranto* proceedings, and it is contended that he has not tendered a proper bond, he cannot be ousted, except when, upon application to the court, the judgment of induction is revoked for his failure to do so. *Ibid.*

3. *Cities and Towns—Debt—Necessaries.*—The governing authorities of a town may, in the exercise of good business prudence and under existing conditions rendering such course desirable and proper, issue bonds for the present or ultimate payment of a debt lawfully incurred for the necessary expenses of the town. *Commissioners v. Webb*, 120.

4. *Cities and Towns—Pavements—Debt—Necessaries—Vote of People—Constitutional Law.*—The cost of maintaining the streets of a town, to the extent and in the manner required

BOND ISSUES—*Continued.*

for the well ordering and good government thereof, is a necessary expense, and an indebtedness incurred therefor without submitting it to a vote of the people is not unconstitutional on that account, under Constitution, Art. VII, section 7. *Ibid.*

5. *Same—Statutory Requirements.*—When the governing authorities of a town are given legislative power to issue bonds for the payment of the necessary expenses thereof, but by the same power it is provided that the question shall be submitted to the voters thereof for their approval, the provision of the statute in this respect must be complied with to give validity to the issue. *Ibid.*

6. *Same—"Streets" Include "Sidewalks," When.*—The charter of a town provided that when the commissioners decided to pave the streets thereof the question should be submitted to the vote of the people. In a suit to test the validity of a bond issue of $18,000 to pave the sidewalks, etc.: *It was held*, that in an undertaking of this magnitude by a town the term "streets" included the sidewalks, and if such purposes were necessary to the town the statutory provision that the question should be submitted to the vote of the people must be complied with. *Ibid.*

7. *Same—Lien on Adjoining Land.*—A provision in the charter of a town that the lot owners may be required to pave the sidewalks, under certain circumstances, and to pay therefor, and if they fail to do this, after proper notice, the town commissioners may have them paved and charge the amount as a lien on the property to the respective owners, does not authorize a bond issue by the town, without a vote of the people, which embraces a general scheme for paving the sidewalks or an indefinite, undesignated number of them, and for incurring a town indebtedness of $18,000 for this general purpose, when by another provision of the charter it is required that the question of paving the streets shall first be submitted to a vote of the people. *Ibid.*

8. *Counties—Validity of—Taxation—Levy—Constitutional Limitations.*—County bonds issued by a popular vote of the county for training-school purposes, under legislative authority, without provision to exceed the constitutional limitation of levy for principal, interest or for a sinking fund, are valid and a good tender, under a contract with the purchasers calling for the delivery of valid bonds, though they are not for necessary purposes. *Commissioners v. McDonald*, 125.

9. *Same.*—When bonds are issued by a county by popular vote, under legislative authority, which does not further provide for a levy to exceed the constitutional limitation for princi-

BOND ISSUES—*Continued.*

pal, interest or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction. State Constitution, Art. VII, sec. 7. (*Charlotte v. Shepard*, 122 N. C., 602, where the bonds were issued by a town, cited and distinguished.) *Ibid.*

10. *Municipal Bonds—Registration Books—Charter and Further Legislative Provisions—Interpretation—Constitutional Law.* When there is a charter requirement of a municipality that registration books be kept open for twenty days preceding an election, and, under the provisions of a subsequent legislative act, bonds are issued pursuant to a further requirement that ten days' previous notice shall be given of the whereabouts of the registrar, the provision of the act is construed to supply a reasonable requirement, concerning which the charter is deficient, and the issue is valid when the provisions of the charter and the act are complied with.—*Cottrell v. Lenoir*, 137.

11. *Municipal Bonds — Legislative Authority — Vote of People — Constitutional Law.*—Municipal bonds for special purposes, issued by express authority of the Legislature and approved by a majority of the qualified voters of the town, are valid. (*Wharton v. Greensboro*, 146 N. C., 356, cited and distinguished.) *Ibid.*

BOUNDARIES. See Deeds and Conveyances, 13, 14, 21, 22.

BRIEF. See Appeal and Error, 7.

BURDEN OF PROOF.

1. *Telegraph — Negligence — Messages, Delay in Delivery of — Prima Facie Case.*—When the failure of a telegraph company to deliver a message is shown, a *prima facie* case of liability is made out, and the burden of proof is upon the company to show facts excusing its failure. *Woods v. Telegraph Company*, 1.

2. *Condemnation Proceedings—Pleadings—Effort to Acquire by Agreement.*—The burden of proof is on the petitioner in condemnation proceedings to show, in support of the necessary allegation to that effect, that a previous effort to acquire title to the *locus in quo* by agreement had been made, and the reason of the failure therein, and he is not relieved of this necessity by the denial in the answer of his right to condemn. *Railroad v. Railroad*, 59.

3. *Penalty Statutes—Carriers of Goods—Defense—Evidence.*—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by Revisal, sec. 2632, under

BURDEN OF PROOF—*Continued.*

the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." *Robertson v. Railroad*, 323.

4. *Contracts in Writing—Principal and Agent—Waiver by Parol.* In order to establish a waiver, by parol, of the express terms of a written contract by an agent of one of the parties, the burden of proof is on the party seeking to establish it.—*Medicine Co. v. Mizell*, 384.

5. *Deeds and Conveyances — Tax Deeds — Validity — Presumptions.*—One relying upon a tax deed for title to lands must show that the statutory requirements necessary to the validity of the deed have been met, for there is no legal presumption in favor of the validity of the deed otherwise than the statute provides. *Warren v. Williford*, 474.

6. *Negotiable Instruments—Holder in Due Course—Fraud—Notice.*—When it is shown that a negotiable instrument sued on has been procured by fraud, or there is evidence tending to establish it, it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it. (Revisal, secs. 2201, 2208.) *Bank v. Fountain*, 590.

7. *Instruments — Evidence — Questions for Jury.* — When it has been established or there is allegation and evidence tending to show that a negotiable instrument was procured by fraud, in a suit by one claiming to be the holder in due course, it was error for the trial Judge, upon supporting evidence, to charge the jury that the *prima facie* case of the plaintiff was restored by his uncontradicted testimony, that he acquired the note in the usual course of business, before maturity and without notice of any vice in it, as the burden of proof thereof was upon plaintiff, and the question as to the issue and the credibility of the evidence thereon was one for the jury. *Ibid.*

CARRIERS OF FREIGHT.

1. *Express—Measure of Damages—Profits.*—In an action against an express company for damages arising from a wrongful delay in the shipment of an engine shaft, whereby plaintiff's factory was necessarily stopped in its operation, evidence

CARRIERS OF FREIGHT—*Continued.*

tending to show as a measure of damages the current profits is, as a general rule, incompetent. *Furniture Co. v. Express Co.*, 87.

2. *Express—Measure of Damages—Special Circumstances—Implied Notice.*—When goods are shipped for a special purpose or for present use it is not always necessary that those facts should be mentioned in the negotiations, or in express terms made a part of the contract; for, when they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages in a suit against the carrier for wrongful delay, when they naturally and proximately follow from the breach of duty. *Ibid.*

3. *Same—Questions for Jury.*—The plaintiff caused to be shipped to its own address by express an engine shaft weighing not less than 650 pounds, from Erie, Pa., to Lenoir, N. C. The plaintiff's name indicated its business as that of manufacturing furniture. Upon the measure of damages in a suit against the express company for wrongful delay: *Held*, (1) that the express company was fixed with implied notice of the facts and circumstances under which special damages necessarily arose to plaintiff from the stopping of its factory on account of the delay; (*a*) the unusual shipment by express indicated urgency; (*b*) the name of the consignee indicated the purpose for which the shipment was needed; (*c*) the shaft indicated that it was necessary to the working of the engine to run the machinery, and (*d*) the size of the shaft was evidence of the power of the engine required to work the machinery; (2) the measure of damages was the interest on capital invested and unproductive for the time, and, when applicable, the pay of idle and necessarily unemployed hands, with such other expenses reasonably referable to defendant's wrong, including an outlay of plaintiff in a reasonable effort to minimize the loss; (3) the question upon the facts presented was one for the jury. *Ibid.*

4. *Penalty Statutes — Benefit of Shipper — Party Aggrieved.* — When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under Revisal, sec. 2632, and the proper party plaintiff. Revisal, sec. 400. *Robertson v. Railroad*, 323.

5. *Penalty Statutes—Suit for Damages and Penalty—Joinder of Action—Contract—Merger.*—An action for damages against a carrier for a lost shipment, and one for the penalty for

CARRIERS OF FREIGHT—*Continued.*

unreasonable delay, given by Revisal, sec. 2632, do not merge into each other. They arise on contract and may be joined in the same action. Revisal, sec. 2634. *Ibid.*

6. *Penalty Statutes—Defense—Burden of Proof—Evidence.*—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by Revisal, sec. 2632, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." *Ibid.*

7. *Penalty Statutes—Action for Penalty, Form of.*—Under Revisal, sec. 2632, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, that would be a mere informality, which could be remedied by amendment. *Ibid.*

8. *Liability—Notice to Consignee—Reasonable Time to Remove—Warehousemen.*—The liability of a common carrier continues until notice is given consignee of arrival of shipment of goods at destination and a reasonable time given to remove it. Thereafter the carrier's liability is that of a warehouseman. *Poythress v. Railroad*, 391.

9. *Same—Requirements of Notice.*—Notice of the arrival of a shipment of goods, to relieve the carrier of liability as such, need not be served personally on the consignee by the carrier. The requirements of Rule 1 of the Corporation Commission are applicable: "Notice shall be given by delivering same in writing, in person or by leaving it at consignee's place of business or by depositing it in the post office." *Ibid.*

10. *Pleadings — Demurrer — Cause Defectively Stated — Amendments.*—A demurrer will not be sustained to a complaint merely because a cause of action is defectively stated, which may easily be remedied by amendment, if necessary. *Ibid.*

11. *Consignor and Consignee—Contract to Deliver—Suit by Consignor.*—A vendor who is under contract to deliver goods to a vendee is entitled to recover the identical goods or, if they are lost, their value and interest, from a common carrier in default, to whom they had been delivered for shipment. *Box Factory v. Railroad*, 421.

12. *Same—Evidence—Nonsuit.*—It is error in the trial Judge to render a judgment of nonsuit upon the evidence in an action brought by a consignor against a common carrier to recover the value of a lost shipment, when there is evidence that he

CARRIERS OF FREIGHT—*Continued.*

was under contract to deliver it to the consignor at destination. In such instances the title and possession of the shipment do not, as a matter of law, pass to the consignee by delivery to the common carrier. *Ibid.*

13. *Records—Corroborative Evidence.*—In an action against a carrier for damages arising from an injury to stock *en route*, an "original record" of one of the freight conductors, tending to show that the stock was not so injured, is incompetent, unless corroborative of the direct testimony of the conductor who made the record. *Jones v. Railroad*, 449.

14. *Live Stock Injured—Possession of Carriers—Presumptive Evidence—Rebuttal.*—Plaintiff's action is against the carrier to recover for injury to live stock in transit, including the killing of a horse. There was evidence tending to show the injury was received while the stock was in defendant's possession: *Held*, (1) the evidence made out a *prima facie* case against the carrier; (2) it was proper for the court to charge the jury, upon supporting evidence, that if the horse died from natural causes or was injured as an ordinary incident of handling a car of stock, the presumption of negligence would be rebutted; and this rule would apply to all the stock delivered in a damaged condition. *Ibid.*

15. *Accepting Freight — Evidence — Nonsuit.* — When it appears that the plaintiff, in an action against a carrier for failure to accept freight for shipment when tendered, did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but that they carried it back and shipped it the next day, a motion as of nonsuit upon the evidence should be allowed. *Cox v. Railroad*, 459.

16. *Damage to Stock—Carrier's Possession—Liability as Carrier—Evidence—Burden of Proof.*—In an action against a carrier for damages to shipment of stock it was shown, without contradiction, that the carrier's agent could not find the consignee, and procured, without plaintiff's requesting it, a stable keeper to take care of the stock; that the stock was apparently in good order upon arrival, but the next morning one mule was dead—apparently had died from being trampled upon: *Held*, (1) the liability of carriers, as such, continues for a reasonable time after transportation ceases, and it was not error in the trial Judge to instruct the jury, if they believed the evidence, to find that the mule was injured while in the carrier's possession; (2) a *prima facie* case of negligence was made out against the carrier, and the burden was upon the carrier at least to introduce evidence tending to show it had discharged its duty. *Jones v. Railroad*, 580.

CARRIERS OF FREIGHT—*Continued.*

17. *Reasonable Stipulations—Damage to Stock—Agreed Valuation.* A voluntary agreement by the shipper with the carrier, in consideration of a reduction in the rate of freight, that in case of loss or damage to the stock shipped the valuation thereof shall not exceed $100 a head, is valid as fixing in good faith a stipulated and reasonable value for a species of property of uncertain value, concerning which, in case of loss, the carrier would be without evidence. *Ibid.*

18. *Damage to Stock—Notice of Claim—Reasonable Stipulations.*—A stipulation in a contract of carriage that, in consideration of a reduction of freight rate for the carriage of stock, the consignee should give notice in writing of any claim for loss or damage to some officer of the carrier or its nearest station agent, before the stock is removed from its place of destination or mingled with other stock, is reasonable and just, intended to prevent fraud and imposition, and therefore valid, though unavailable as a defense in this case, as it is shown that the stock had not been removed from the carrier's possession. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Negligence—Declarations, Corroborative.*—When, in an action for damages claimed by reason of the negligence of defendant's employees, while attempting to rescue a passenger on its steamboat who had fallen overboard as the boat was making her regular trip, the defendant proved, by the one who was sent out for the purpose of rescue, the good condition of the bateau being thus used, it was not error to admit, on behalf of plaintiffs, solely as impeaching evidence, subsequent declarations of this witness tending to show that the bateau was in a leaking condition, and that another man would have been helpful in bailing it. *Pate v. Steamboat Co.*, 571.

2. *Steamboats—Passenger Overboard—Rescue—Negligence—Evidence—Questions for Jury.*—After discovering the peril of a passenger who had fallen overboard into the water from defendant's steamboat while on her trip, it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of the ship and the other passengers, to rescue him; and evidence of negligence in the performance of this duty is sufficient to be passed on by the jury, which tends to show unnecessary confusion and delay, that the bateau used was leaky and unfit and not properly manned, that there were no lights, and that with reasonable alacrity and proper help the boat might have reached the spot where the passenger sank in time to have saved him. *Ibid.*

CAUSE OF ACTION.

1. *Pleadings—Joint Cause Alleged—Consolidation.*—It was not error in the lower court to consolidate two suits brought by the plaintiff against two distinct railway companies, when the injury complained of is alleged in the complaint to have arisen from the failure of each defendant to adopt, promulgate and enforce together, a reasonably safe system and rules regulating the approach of their engines and cars at a crossing of their tracks for the protection of their passengers thereat, thus rendering the condition of the passengers extra hazardous. *Martin v. Railroad*, 259.

2. *Same—Negligence—Defenses—Proximate Cause—Single Liability.*—When each of the complaints in two separate suits against two distinct corporations alleges a joint cause of action upon the question of negligence as to both, it is no valid objection, under our Code practice, to an order consolidating them, that either the one or the other defendant may be found solely liable on the trial, owing to some act or omission to act being the proximate cause of the injury. *Ibid.*

3. *Same—Issues.*—In an action for damages alleged to have arisen from the joint negligence of two defendant railroad companies, caused by a collision at a crossing of their tracks, where either one or the other may or may not be held liable under the doctrine of proximate cause, the court should submit appropriate issues directed to the several phases of the pleadings, and for greater certainty may in his discretion submit other pertinent questions to the jury as allowed by the statute. *Ibid.*

CAUSES, SEPARABLE. See Penalty Statutes, 10.

CERTIFICATE. See Appeal and Error, 16.

CHARTER RIGHTS. See Bond Issue, 10.

CITIES AND TOWNS.

1. *Powers of Commissioners—Quo Warranto.*—Under Revisal, sec. 2917, "The corporate powers (of towns and cities) can be exercised only by the board of commissioners or in pursuance of resolutions adopted by them, unless otherwise provided by law," and the power of a town to remove a public officer for cause is one of the common-law incidents to all corporations. *Burke v. Jenkins*, 25.

2. *Same—Public Officer—Removal for Cause.*—It is within the powers of the town commissioners to remove, upon notice, the town treasurer from office for disobeying their orders in paying certain indebtedness and not refunding when so paid. *Ibid.*

CITIES AND TOWNS—*Continued.*

3. *Same—Review by Courts.*—When it is allowable for the town commissioners to remove the town treasurer for cause, the soundness of the cause is reviewable by the courts upon a *quo warranto*, but a trial by jury is not required. *Ibid.*

4. *Mandamus—Town Commissioners—Bond, Acceptance and Approval — Ministerial Duties.* — A *mandamus* will only lie against the town commissioners to compel the consideration of a bond offered by the town treasurer, and not to compel them to accept and approve it, the commissioners being individually liable in taking one which they knew or should have known was insufficient. *Burke v. Commissioners*, 46.

5. *Condemnation of Lands—Notice to Owners—Description.*—In condemnation proceedings, by a city, of lands beyond its limits for the purposes of waterworks and water supply, under authority conferred by statute, it is not necessary to enumerate in the resolution of the board of aldermen, or the notices to the owners given in pursuance thereof, the exact purposes for which the land might be needed, if the descriptive language of the statute is followed, which enumerates them in the disjunctive; and it is unnecessary to give exact boundaries, for it is sufficient if the various tracts are given and the owners notified. *Asheville v. Weaver*, 56.

6. *Debt—Necessaries—Bond Issue.*—The governing authorities of a town may, in the exercise of good business prudence and under existing conditions rendering such course desirable and proper, issue bonds for the present or ultimate payment of a debt lawfully incurred for the necessary expenses of the town. *Commissioners v. Webb*, 120.

7. *Pavements — Debt — Necessaries — Vote of People—Constitutional Law.*—The cost of maintaining the streets of a town, to the extent and in the manner required for the well ordering and good government thereof, is a necessary expense, and an indebtedness incurred therefor without submitting it to a vote of the people is not unconstitutional on that account, under Constitution, Art. VII, sec. 7. *Ibid.*

8. *Same—Statutory Requirements.*—When the governing authorities of a town are given legislative power to issue bonds for the payment of the necessary expenses thereof, but by the same power it is provided that the question shall be submitted to the voters thereof for their approval, the provision of the statute in this respect must be complied with to give validity to the issue. *Ibid.*

9. *Same—"Streets" include "Sidewalks," When.*—The charter of a town provided that when the commissioners decided to pave the streets thereof the question should be submitted

to the vote of the people. In a suit to test the validity of a bond issue of $18,000 to pave the sidewalks, etc.: *It was held*, that in an undertaking of this magnitude by a town the term "streets" included the sidewalks, and if such purposes were necessary to the town the statutory provision that the question should be submitted to the vote of the people must be complied with. *Ibid.*

10. *Same—Lien on Adjoining Land.*—A provision in the charter of a town that the lot owners may be required to pave the sidewalks, under certain circumstances, and to pay therefor, and if they fail to do this, after proper notice, the town commissioners may have them paved and charge the amount as a lien on the property to the respective owners, does not authorize a bond issue by the town, without a vote of the people, which embraces a general scheme for paving the sidewalks or an indefinite, undesignated number of them, and for incurring a town indebtedness of $18,000 for this general purpose, when by another provision of the charter it is required that the question of paving the streets shall first be submitted to a vote of the people. *Ibid.*

11. *Streets—Dedication—Revocation—Description—Evidence—Nonsuit.*—C. was the owner of two certain town lots abutting on A. Street, numbers 37 and 38, from whom plaintiff claims under *mesne* conveyances. A. Street had been laid off and designated on a map of the town, but had never been used for street purposes. C., prior to conveying the lots, obtained a quitclaim deed from the town to A. Street under legislative authority, which subsequently came by *mesne* conveyances to defendants. In making the deed to the two lots under which plaintiff claims, the following calls were given: to "a stake, the old S. West corner of lot 37, on the edge of old A. Street; thence with the line of lot 37," etc.: *Held*, (1) that the deed of A. Street to C. from the town was valid and effective, and, though there was evidence of a prior dedication of that street, the deed from the town amounted to a revocation by mutual consent; (2) that the calls in the deed under which plaintiff claims were meant for description only; (3) that the motion for judgment as of nonsuit upon the evidence should have been granted. (*Southport v. Stanly*, 125 N. C., 464, cited and distinguished.) *Church v. Dula*, 262.

12. *Grading Streets—Damage to Abutting Owner—Liability of City.*—Revisal, sec. 2930, provides that the commissioners shall keep the streets, etc., of a town in repair, "in such manner and to the extent they deem best, and cause such

CITIES AND TOWNS—*Continued.*

improvements in the town to be made as may be necessary." Therefore, when the commissioners of a town, in the exercise of these powers, cause, in their discretion, grading of the streets or sidewalks to be made, whereby the value of plaintiff's property has been decreased, the plaintiff cannot recover of the town therefor, in the absence of statutory provision for compensation, if the commissioners have acted with due care and skill. *Dorsey v. Henderson*, 423.

13. *Same—Change of Plan—Ratification.*—When the street commissioners of a town changed the original plans of its civil engineer in regard to grading the streets and sidewalks, and damages are claimed by a property owner on that account, the courts are precluded from inquiring into the advisability of the change, when it appears that the town commissioners have adopted and approved it. *Ibid.*

14. *Ownership—Evidence—Issues.*—An allegation and supporting evidence that certain tobacco, the subject of claim and delivery proceedings, was in a house on defendants' land at the time of the alleged sale, and by agreement was to be hauled and delivered to plaintiffs by defendants; is sufficient to raise the issue, "Did defendants afterwards agree with plaintiffs that the tobacco should remain on defendants' land as the property of the plaintiffs?" *Andrews v. Grimes*, 437.

CLERK OF THE COURT. See Condemnation Proceedings, 4.

COLLATERAL ATTACK. See Pleadings, 11; Judgments, 11.

COLLATERAL MATTERS. See Evidence, 43; Pleadings, 16.

COLOR OF TITLE. See Deeds and Conveyances, 21, 22.

COMMERCE CLAUSE. See Constitutional Law, 20.

COMMINGLING OF FUNDS. See Guardian and Ward, 1.

COMMISSIONERS. See Cities and Towns, 4.

COMMISSIONERS, POWERS OF. See Cities and Towns, 1.

COMMON SOURCE OF TITLE. See Deeds and Conveyances, 24, 25, 26.

CONCURRENT NEGLIGENCE. See Negligence, 6, 7, 8.

CONDEMNATION PROCEEDINGS.

1. *Cities and Towns—Condemnation of Lands—Notice to Owners—Description.*—In condemnation proceedings by a city of lands beyond its limits for the purposes of waterworks and water supply, under authority conferred by statute, it is not necessary to enumerate in the resolution of the board of al-

CONDEMNATION PROCEEDINGS—*Continued.*

dermen, or the notices to the owners given in pursuance thereof, the exact purposes for which the land might be needed, if the descriptive language of the statute is followed, which enumerates them in the disjunctive; and it is unnecessary to give exact boundaries, for it is sufficient if the various tracts are given and the owners notified. *Asheville v. Weaver*, 56.

2. *Statutes, Construction of.*—Section 2580, Revisal, stating the requisites of a petition in condemnation proceedings, must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. *Railroad v. Railroad*, 59.

3. *Same—Appeal—Procedure—Record.*—The appeal, provided by section 2587, from a judgment by the Clerk of the Superior Court in condemnation proceedings, under Revisal, sec. 2580, takes the entire record up for review upon questions of fact to be tried by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed. *Ibid.*

4. *Appeal—Clerk of Court—Findings of Fact Not Final.*—The findings of fact of the Clerk upon preliminary allegations, under Revisal, sec. 2580, in condemnation proceedings, are not final and may be appealed from. Revisal, sec. 2587. *Ibid.*

5. *Appeal—Exceptions, How Taken.*—Upon proper denial of the matters alleged in the petition, exceptions to the Clerk's order appointing commissioners in condemnation proceedings may be of a general character, and, upon appeal, will present any question appearing upon the record. *Ibid.*

6. *Same — Brief — Abandoned, When.*— Exceptions appearing of record but not referred to in appellant's brief are treated as abandoned in the Supreme Court. Rule 34, 140 N. C., 666. *Ibid.*

7. *Nonsuit—Defendant's Rights—Procedure.*—In proceedings by one railroad company to condemn a right of way upon which another was lawfully constructing its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after having obtained an order, in the progress of the case, giving it exclusive possession and ejecting the defendant from the *locus in quo*. *Ibid.*

8. *Same—Answer—Interests Involved—Rights of Public.*—When a defendant railroad company in possession of the *locus in quo*, the subject of condemnation proceedings by another railroad company, has set up new matter in its answer in-

CONDEMNATION PROCEEDINGS—*Continued.*

volving its rights to its exclusive occupation thereof, alleging that large sums had been invested in the prosecution of its work thereon, and larger sums for investment are awaiting the termination of the controversy involving the construction of this important line of railroad, it is entitled to have its claim adjusted and settled, and it is for the public good that a settlement of the controversy be had, and plaintiff's motion for judgment of nonsuit was properly refused. *Ibid.*

9. *Appeal—Findings of Fact Conclusive.*—In condemnation proceedings, when it is proper for the lower court to find the facts, his findings upon competent supporting evidence are conclusive. *Ibid.*

10. *Petition—Allegation of Failure to Agree.*—It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and reason of the failure to do so. In the absence of proof thereof the petition should be dismissed. *Ibid.*

11. *Same—Burden of Proof.*—The burden of proof is on the petitioner in condemnation proceedings to show, in support of the necessary allegation to that effect, that a previous effort to acquire title to the *locus in quo* by agreement had been made, and the reason of the failure therein, and he is not relieved of this necessity by the denial in the answer of his right to condemn. *Ibid.*

12. *Bond—Appeal—Liability—Procedure.*—The amount of damages upon plaintiff's bond on appeal in condemnation proceedings may be assessed at the next term of the trial court, when a judgment below adverse to him is sustained on appeal. Revisal, sec. 1542. *Ibid.*

CONDITION ANNEXED. See Negligence, 17.

CONDITIONS PRECEDENT. See Contracts, 11, 13; Penalty Statutes, 12.

CONDITIONS, VALID. See Insurance, 5.

CONDITIONS, VOID. See Deeds and Conveyances, 28.

CONSENT JUDGMENT. See Judgments, 2.

CONSIGNOR AND CONSIGNEE. See Carriers of Freight, 8, 9, 11, 12.

1. *Negotiable Instruments—Draft, Bill of Lading Attached—Holder in Due Course—Original Contract, Liability of Holder on.*—One who has discounted a draft in due course, made for the purchase price of goods, with bill of lading attached, and

CONSIGNOR AND CONSIGNEE—*Continued.*

assigned to him as security to the draft, is not liable on that account for a breach of warranty in a contract between the consignor and consignee respecting the quality of the goods, the subject of the bill of lading. *Mason v. Cotton Co.*, 492.

2. *Same—Rights of Holder in Due Course—Strangers—Notice.*—By discounting a draft with bill of lading attached, and assigned as security, the holder has an interest in the goods, the subject of the bill of lading, only to the extent sufficient to protect his claim; and when the consignee accepts and pays the draft and receives the goods from the carrier on presentation of the bill of lading, without being permitted by the carrier to examine them, he does so in recognition of the holder's rights, and the holder is not liable upon a breach of warranty of contract between the original parties, to which he was a stranger, in the absence of evidence that he had notice thereof. *Ibid.*

3. *Negotiable Instruments — Drafts, Acceptance of — Rights of Holder in Due Course—Contracts.*—After a draft for the purchase price of goods, with bill of lading attached, has been accepted by the drawee, the amount previously paid therefor by a holder in due course becomes a new and binding consideration, giving such holder a position superior to the original contract rights between the consignor and consignee, and to any defenses existent between them. *Ibid.*

CONSOLIDATION. See Causes of Action, 1, 2.

CONSTITUTION, STATE.

Article V, section 1. The proper remedy to enforce the constitutional equation between poll and property tax is *mandamus.* Poll tax limit of two dollars for State and county tax is imperative. *Railroad v. Commissioners*, 220.

Article V, section 1. The restriction that State and county tax combined shall not exceed two dollars on the poll does not apply to municipal or *quasi* public corporations other than counties. *Perry v. Commissioners*, 521.

Article VI, section 4. Depriving a citizen of the right to vote unless he has paid his poll tax for the previous year refers only to the poll tax prescribed under Article V, section 1. *Perry v. Commissioners*, 521.

Article VII, special school districts may levy a tax on poll exceeding two dollars when submitted to and approved by the qualified voters as required by the Constitution. *Perry v. Commissioners*, 521.

CONSTITUTION, STATE—*Continued.*

Article VII, section 7. Bonds issued by a municipality when no legislative provision has been made for a levy. *Commissioners v. MacDonald*, 125.

Article VII, section 7. Board of trustees of graded school a municipal corporation. *Hollowell v. Borden*, 255.

Article VII, section 7. Construed in relation to Article V, section 1, permits increase of property over equation between the property and poll. *Railroad v. Commissioners*, 220.

Article VII, section 7. Separate school district may be established by the Legislature within another municipality. *McLeod v. Commissioners*, 77.

CONSTITUTIONAL QUESTIONS. See Constitutional Law, 14.

CONSTITUTION, UNITED STATES.

Article I, section 8. To this section Revisal, sections 2634 and 2644, imposing certain penalties on carriers for failure to perform certain duties, are not repugnant. *Iron Works v. Railroad*, 469.

CONSTITUTIONAL LAW.

1. *Taxation—School Districts Within Municipality—Town Commissioners.*—An act creating a school district within the limits of a town and authorizing a vote upon the question of issuing bonds within the district prescribed, by taxation on property and polls therein, is not void by reason of a provision that the board of commissioners of the town were designated to call the election and have the usual powers incident to the issue and levy. *McLeod v. Commissioners*, 77.

2. *Same—Taxation—School Districts Within Municipality—Vote of the People.*—An act creating by clearly expressed language a prescribed school district within the corporate limits of a town, and providing for an indebtedness and levy by taxation upon the property and polls within that district for school purposes, and in another part there are expressions to the effect that the tax so levied "shall be" for the support of schools in said town, and the purchase of land and erection of school buildings thereon "with money raised by issuing bonds of the town," as provided for, when construed as a whole, does not impose a debt upon the poll and property in the town outside of the prescribed school district, and is not, therefore, unconstitutional as being without the consent of the people living in the town beyond the school limits. *Ibid.*

3. *Legislative Powers—School District Within Municipality—Uniformity.*—The Legislature may establish a separate school district within another municipality, under the provisions of

CONSTITUTIONAL LAW—*Continued.*

Article VII, section 7, when the principle of uniformity is established, as required by section 9 of this article. (*Smith v. School Trustees*, 141 N. C., 143, cited and approved.) *Ibid.*

4. *Same—Race Discrimination.*—An act creating a school district within certain prescribed limits in the corporate limits of a town, will not be held as an unconstitutional discrimination between the two races, when it appears that there are no colored children within the school district, and there is no suggestion that those in the town outside the district have not been provided with ample means and facilities for their education. (*Lowery v. School Trustees*, 140 N. C., 33, cited and approved.) *Ibid.*

5. *Cities and Towns — Pavements — Debt—Necessaries—Vote of People.*—The cost of maintaining the streets of a town, to the extent and in the manner required for the well ordering and good government thereof, is a necessary expense, and an indebtedness incurred therefor, without submitting it to a vote of the people, is not unconstitutional on that account, under Constitution, Art. VII, sec. 7. *Commissioners v. Webb*, 120.

6. *Counties—Bond Issues, Validity of—Taxation—Levy—Constitutional Limitations.*—County bonds issued by a popular vote of the county for training-school purposes, under legislative authority, without provision to exceed the constitutional limitation of levy for principal, interest or for a sinking fund, are valid and a good tender, under a contract with the purchasers calling for the delivery of valid bonds, though they are not for necessary purposes. *Commissioners v. MacDonald*, 125.

7. *Same.*—When bonds are issued by a county by popular vote, under legislative authority, which does not further provide for a levy to exceed the constitutional limitation for principal, interest or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction. State Constitution, Art. VII, sec. 7. (*Charlotte v. Shepard*, 122 N. C., 602, where the bonds were issued by a town, cited and distinguished.) *Ibid.*

8. *Municipal Bonds—Registration Books—Charter and Further Legislative Provisions — Interpretation.* — When there is a charter requirement of a municipality that registration books be kept open for twenty days preceding an election, and, under the provisions of a subsequent legislative act, bonds are issued pursuant to a further requirement that ten days' previous notice shall be given of the whereabouts of the registrar, the provision of the act is construed to supply a rea-

CONSTITUTIONAL LAW—*Continued.*

sonable requirement, concerning which the charter is deficient, and the issue is valid when the provisions of the charter and the act are complied with. *Cottrell v. Lenoir*, 137.

9. *Municipal Bonds — Legislative Authority — Vote of People.* — Municipal bonds for special purposes, issued by express authority of the Legislature and approved by a majority of the qualified voters of the town, are valid. *Ibid.*

10. *Taxation — Constitutional Limitations — Equation Between Property and Poll Tax—Validity—Practice—Mandamus.*—*Mandamus* to compel the commissioners of a county to collect a sufficient poll tax, under Article V, section 1, of the Constitution of North Carolina, is the proper remedy in an action by a taxpayer contending that a tax levied does not observe the constitutional equation between the poll and the property tax. *Railroad v. Commissioners*, 220.

11. *Statutes—Duty of Courts.*—The courts of the State will not declare a legislative enactment unconstitutional unless it clearly or convincingly appears to them to be so. *Ibid.*

12. *Taxation—Interpretation of Statutes—Construed as a Whole—Special Tax—Validity.*—Article V, section 1, of the State Constitution, providing an equation between the poll and property tax, and section 6 thereof, requiring that "the tax levied by the commissioners of the several counties for county purposes shall never exceed the double of the State tax, except for a special purpose and with the special approval of the Legislature"; and Article VII, section 7, thereof, prescribing the limitations upon the counties, etc., to contract debts for other than necessary expenses, should be construed in relation to each other, and thereunder a special tax voted by the people of a county, specially authorized by the Legislature, is not unconstitutional by reason of an increase thereby of the property tax over the constitutional equation between the general property and the poll tax. *Ibid.*

13. *Poll Tax Not to Exceed $2.*—The last clause in Article V, section 1, of the State Constitution, limiting "the State and county capitation tax combined," so as not to exceed $2 on the head, is imperative. *Ibid.*

14. *Statutes in Violation of Contracts — Parties — Constitutional Questions, by Whom Raised.*—When a taxpayer has not shown that any rights of his in relation to a bond issue by a county have been affected, he cannot avail himself of the contention that a subsequent statute, repealing the statute under the provisions of which the issue was made, violated the obligations of a contract. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

15. *Taxation—No Direction of Levy of Poll Tax—No Repealing Statute.*—The only difference between the facts found in this case and those in the case immediately preceding, being that the statute in this case does not in express terms direct that a poll tax be levied, and that there is no repealing act directing the levy of a poll tax or the levying of such tax beyond the sum of $2: *Held*, the digest in that case is fully applicable to this one on all points. *Railroad v. Commissioners*, 248.

16. *Municipal Corporations—School Districts.*—A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of Article VII, section 7, of the State Constitution. *Hollowell v. Borden*, 255.

17. *Same—Debts Contracted—Public Schools—Special Purpose—Vote of the People—Necessaries.*—The expense of a public-school system of a town is not a necessary municipal expense, and a bond issue to pay a debt contracted for that purpose, to be constitutional, must be submitted to a vote of the qualified voters of the township. Laws 1905, ch. 533, sec. 14. (*Collie v. Commissioners*, 145 N. C., 170, cited and distinguished.) *Ibid.*

18. *Trespass—Husband and Wife—Seduction Attempted—Damages, Right of Husband to Recover.*—The statutory and constitutional enlargement of the property rights of the wife does not affect the rights of the husband, in an action of trespass upon his home, upon the wife's land, with the intent and attempt to seduce or carnally know her. *Brame v. Clark*, 364.

19. *Penalty Statutes—Commerce Clause.*—Sections 2634 and 2644 of the Revisal, imposing certain penalties against common carriers, are not unconstitutional as in violation of the Fourteenth Amendment to the Federal Constitution, or the Commerce Clause (Art. I, sec. 8) of said Constitution, and the acts passed in pursuance thereof. *Iron Works v. Railroad*, 469.

20. *Taxation—Poll Tax Increased Over $2—State and County Tax—Special Taxation.*—A special-school district created under Revisal, sec. 4115, may levy a tax on the poll, when submitted to and approved by the qualified voters thereof, in an election duly held, in excess of $2, under the provisions of Article VII of the State Constitution. The equation between the property and poll tax established by Article V, sec. 1, and the restriction that the State and county tax combined shall never exceed $2 on the poll, applies only to State and county taxation, and not to municipal or *quasi* public corporations other than counties. *Perry v. Commissioners*, 521.

CONSTITUTIONAL LAW—*Continued.*

21. *Same—Right to Vote.*—Article VI, sec. 4, of the Constitution, depriving a citizen of the right to vote unless he has paid his tax for the previous year, refers to the poll tax prescribed by Article V, sec. 1, to-wit, that for State and county purposes, and it can never exceed $2. This right of suffrage is therefore in no way affected by any increase of taxation imposed on these special-tax districts. *Ibid.*

CONSTITUTIONAL LIMITATIONS. See Constitutional Law, 6, 7, 10.

CONSTRUCTION OF CONTRACTS. See Contracts, 14, 15, 33, 34.

CONSTRUCTION, DEEDS AS MORTGAGES. See Deeds and Conveyances, 5, 28.

CONSTRUCTION OF STATUTES. See Interpretation of Statutes.

CONSTRUCTION OF WILLS. See Wills, 4, 5, 6, 8, 9, 10.

CONTRACTS.

1. *Insurance — False Representations — Reformation.*—Courts of equity will reform a written contract of life insurance in accordance with the representations made by the agents of the insurance company, which are false and fraudulent, relied on by the insured, and reasonably induced him, an illiterate man, to accept it as the one he thereby supposed it to be.—*Sykes v. Insurance Co.*, 13.

2. *Pleadings—Demurrer—Assumed Performance.*—A demurrer to a complaint, in an action for damages for breach of contract, for that it does not allege a contract or agreement between the parties to the suit, though not frivolous, will not be sustained, when it is alleged that the defendant had taken over the contract made by others with the plaintiff, and had expressly agreed with him to fully perform it, and failed to comply with such agreement. *Younce v. Lumber Co.*, 34.

3. *Corporations—Acts of Officers—Purchase—Seal Unnecessary.* A president of a corporation has authority to sign an order for machinery for its use, wherein it is contracted that the title shall remain in the vendor until full payment has been made, and it is not necessary to affix the corporate seal thereto. *Mershon v. Morris*, 48.

4. *Corporations—Receiver's Title.*—Under a contract by a corporation to purchase certain machinery for its use, reserving the title in the vendor till paid, a receiver subsequently appointed takes only such title as the corporation had. *Ibid.*

5. *Insurance—Induced by Fraud—Subsequent Payments—Waiver.* When it is established that an insurance company has in-

CONTRACTS—*Continued.*

duced the insured to take a policy of life insurance by false and fraudulent representations, causing him to believe he could get the amount paid in premiums, with interest, at the expiration of a five-year period, the insured, by then making demand and afterwards continuing to pay for another five-year period under like representations and conditions, does not waive his right of action. *Stroud v. Insurance Co.*, 54.

6. *Insurance—Torts—Waiver—Justices of the Peace—Jurisdiction.*—When an insurance company has received premiums from the insured under a contract of insurance induced by false and fraudulent representations, the insured may waive the tort and sue for money had and received; and, an action therefor being *ex contractu*, the justice's jurisdiction is not limited to $50, as in action for tort. *Ibid.*

7. *Counterclaim—Express Warranty.*—When, in an action to enforce collection of a note given for the purchase price of property, a defense is made by the way of counterclaim based upon the ground of false representations, and not to set the transaction aside for mistake, it is required, to sustain the counterclaim, that defendant should establish that the trade was induced by false and fraudulent representations, reasonably relied on by defendant, or that there was a breach of a warranty given in the contract of sale. *Wrenn v. Morgan*, 101.

8. *Same—Measure of Damages—Value of Shares—Questions for Jury.*—W., M. and C. owned all the shares of stock in a manufacturing corporation, of which W. had the general management. After some bargaining between W. on the one hand and M. and C. on the other, the latter agreed for a certain price to buy the stock of the former, and gave their note for it. Upon this note suit was brought by W., and M. and C. set up by way of counterclaim a demand for damages for breach of warranty. There was evidence that W. furnished or caused to be furnished to M. and C. a statement, corroborated by the books, that the indebtedness of the company was in a certain sum, but in fact it was much greater, and could not have been known or ascertained by M. and C. until after the close of the transaction. There was no evidence of fraudulent intent on the part of W.: *Held*, (1) that it is not necessary that a warranty be made in express terms, and that an affirmation of a material fact intended and relied upon as an inducement to the trade may be sufficient; (2) there was evidence sufficient to go to the jury upon the question of express warranty; (3) the measure of damages was not the difference between the represented and actual indebtedness, but only as it affected the value of the stock bought. *Ibid.*

CONTRACTS—*Continued.*

9. *Fire Insurance — Additional Insurance — Notice.*—Notice that the insured intended to take out additional insurance in the future is not notice of existing insurance at the time of contract. *Black v. Insurance Co.*, 169.

10. *Statutes in Violation of Contracts — Parties — Constitutional Questions, by Whom Raised.*—When a taxpayer has not shown that any rights of his in relation to a bond issue by a county have been affected, he cannot avail himself of the contention that a subsequent statute, repealing the statute under the provisions of which the issue was made, violated the obligations of a contract. *Railroad v. Commissioners*, 220.

11. *Conditions Precedent—Parol Evidence.*—When a promissory note is given in pursuance of the terms of a written contract, evidence can be introduced of a contemporaneous oral agreement, made as a part thereof, to the effect that the note and contract were executed and given upon a condition precedent to their validity, which has not been performed. This does not vary by parol the terms of the written instrument, but postpones its operation until the happening of the contingency. *Hughes v. Crooker*, 318.

12. *Same—Evidence, Sufficient.*—When the defense, in a suit upon a written instrument, is made that it was agreed by plaintiff's agent that the transaction was incomplete until the agent had done a certain specified service, evidence that the agent told defendant that he was absolutely safe, for the contract was not to be regarded as finished until he, the defendant, signed his satisfaction thereon, which was to be upon the performance of the condition, is sufficient upon the question as to whether the contract was made upon that condition. *Ibid.*

13. *Conditions Precedent, Breach of — Negotiable Instruments — Payment of Note—Measure of Damages.*—A holder of a negotiable instrument who has violated his agreement with the maker by negotiating it without performing a condition precedent to its validity, is liable to the maker in such sum as he may have lawfully been compelled to pay thereon to an innocent purchaser for value without notice. *Ibid.*

14. *Interpretation of—Independent Contractor—Evidence.*—When a party defendant aptly sets up the defense of independent contractor in relation to his codefendant, and the only evidence thereof is a written contract to that effect, free from ambiguity, the interpretation of the contract involves questions of law alone, and it is error for the trial Judge to

CONTRACTS—*Continued.*

charge the jury that the paper-writing does not establish the relation of independent contractor, but they can consider it in finding whether such relationship exists. *Gay v. Railroad*, 336.

15. *Same.*—When, under a lawful and clearly expressed contract, one party employs another to do a certain work for him without any supervision or control, and the party for whom the work is done is interested only in its ultimate result, the latter is not liable to third persons in damages for the negligence of the former, provided he has not been negligent in selecting him as a suitable person for the purpose. *Ibid.*

16. *Fraud or Mistake, How Taken Advantage of—Collateral Attack in Action Upon.*—Parol evidence is admissible to vary the terms of a written instrument, only for fraud or mistake, and then the contract must be reformed, upon proper allegations, in an independent action, or by way of affirmative defense, properly pleaded, in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself. *Basnight v. Jobbing Co.*, 350.

17. *Corporations — Principal and Surety — Sureties Signing as Officers—Parol Evidence.*—A written contract, expressed in clear and unambiguous terms, which is set up in the complaint and admitted in the answer, and which was made by a corporation and its stockholders, the latter being named as sureties, with a purchaser of stock, stating that upon demand one year from date the corporation will pay a sum certain for the stock thus bought, should he (the purchaser) so elect, cannot be varied by parol evidence, so as to show that some of the stockholders signed only as officers of the company and not as sureties, though their official signatures appeared upon the instrument. (*Typewriter Co. v. Hardware Co.*, 143 N. C., 97, and other like cases cited and distinguished.) *Ibid.*

18. *Same—Form of Signature—Effect.*—In the body of a contract made by a corporation, guaranteeing certain conditions to a purchaser of shares of its own certificates of stock, it was stated that the corporation had signed as principal and its stockholders as sureties. Some of the stockholders, who were officers, signed the instrument, using their official designation: *Held*, (1) the form of the signature was unimportant and could not vary the clear intent expressed in the body of the instrument; (2) the intent of the sureties to bind themselves personally was not changed by the form of their signatures, for such a change would make the corpora-

CONTRACTS—*Continued.*

tion its own surety, amounting in effect to no surety, as the debts of the corporation would have to be first paid. *Ibid.*

19. *Lands—Specific Performance—Equity Will Enforce, When.*—While specific performance of a contract to convey lands is enforcible only in the sound equitable discretion of the court, and not as a matter of right, in the absence of fraud, mistake or other element making such performance inequitable or a hardship, the courts will grant the relief demanded. *Jones v. Jones*, 358.

20. *Same—Administrator—Mortgagor and Mortgagee—Vendor and Vendee.*—Plaintiffs, in an action to enforce specific performance of a contract to convey lands, made by deceased and his wife, brought suit against the wife as administratrix of her husband, and obtained judgment that the administratrix execute and deliver a deed to him upon payment of the purchase money on a specified day, and in default the lands be sold at public auction for cash, etc., naming a commissioner; also, that the case be retained for further consideration of questions raised by the pleadings in regard to the disposition of the purchase money. The case was inadvertently dropped from the docket by the Clerk, and at a subsequent term reinstated, on defendant's motion, the Judge finding that the administratrix failed to advertise the land as directed, but had since then made a deed to plaintiff upon payment by him of purchase money: *Held*, (1) the judgment, in effect, was to declare the holders of the legal title trustees to secure the purchase money and pay remainder to plaintiff, and by the administratrix accepting the money, the same result would follow upon equitable principles, and her deed would be valid; (2) the decree of sale of the land as made by the court was a proper one, as the relation of vendor and vendee under such conditions is, for all practical purposes, that of mortgagor and mortgagee. *Ibid.*

21. *Written—Parol Evidence—"Vary and Contradict."*—Evidence of an oral stipulation claimed to be made contemporaneously with a written contract, as a part thereof, is incompetent, when in conflict or at variance with the written part. *Medicine Co. v. Mizell*, 384.

22. *Same—Sale of Goods—Countermand.*—When a contract for the sale of goods is evidenced by a paper-writing, specifying that the order therefor is not subject to countermand, that they will be promptly received, on arrival, by the vendee, and that failure to do so will make payment due on demand, that there is no agreement, verbal or otherwise, affecting the terms of the order, parol evidence is inadmissible which

CONTRACTS—*Continued.*

tends to show a contemporaneous oral stipulation, intended to be a part of the contract, but not reduced to writing, that upon failure to sell, after making a reasonable effort, the vendee may return the goods to the vendor at the expiration of a period named. *Ibid.*

23. *Same—Omission to Read.*—Evidence in conflict or at variance with the express terms of a written contract is not admissible upon the ground that the party thereto did not read the contract, when there is no suggestion that he was prevented from reading it, or that he was put off his guard by any fraud, artifice, deception or other wrongful act of the other party. *Ibid.*

24. *Written—Parol Evidence—"Vary or Contradict"—Principle and Agent.*—It is incompetent to show that an agent of one of the parties to a written contract contemporaneously agreed with the other party, by parol, and as a part of the written contract, upon matters contradictory of and at variance with the express statement in writing that there was no such oral agreement. *Ibid.*

25. *Written—Principal and Agent—Waiver by Parol—Burden of Proof.*—In order to establish a waiver, by parol, of the express terms of a written contract by an agent of one of the parties, the burden of proof is on the party seeking to establish it. *Ibid.*

26. *Written—Mortgagor and Mortgagee—Parol Evidence—Contradiction.*—When the vendee of lands has mortgaged them back to the vendor to secure the purchase price in a sum named, and it is expressly stated in the mortgage that a certain number of bales of cotton, weighing 500 pounds each, should be paid in lieu of said sum, at certain times extending over a period of ten years, the notes secured by the mortgage specifying that payment has to be made in cotton accordingly, evidence is incompetent of a parol agreement, made at the time of the execution of the mortgage, that in event of payment in full at any one time, or of foreclosure, the specified amount was to be paid in money at plaintiff's option, as such would be a contradiction by parol evidence of the terms of a written instrument. *Walker v. Venters*, 388.

27. *Crop Payments—Mortgagor and Mortgagee—Measure of Damages—Interest.*—When, under the express terms of a written contract, the purchase price for certain lands was to have been paid in cotton in certain amounts and at various times, in lieu of an amount specified in the mortgage, upon default,

CONTRACTS—*Continued.*

the amount due on the mortgage is the value of the cotton at the market price when each installment fell due, with interest, subject to payments and set-offs, if any. *Ibid.*

28. *Carriers of Goods—Consignor and Consignee—Delivery—Suit by Consignor—Measure of Damages.*—A vendor who is under contract to deliver goods to a vendee is entitled to recover the identical goods or, if they are lost, their value and interest from a common carrier in default, to whom they had been delivered for shipment. *Box Factory v. Railroad*, 421.

29. *Same—Evidence—Nonsuit.*—It is error in the trial Judge to render a judgment of nonsuit upon the evidence in an action brought by a consignor against a common carrier to recover the value of a lost shipment, when there is evidence that he was under contract to deliver it to the consignee at destination. In such instances the title and possession of the shipment do not, as a matter of law, pass to the consignee by delivery to the common carrier. *Ibid.*

30. *Vendor and Vendee—Breach of Warranty—"Opinion Evidence."* In an action to recover the purchase price of a machine, the defense being a breach of warranty, it was competent for witnesses to testify as to their opinion on the question whether the machine was fitted for the work it was guaranteed to do, when the witnesses were qualified by training and experience to express an opinion that would aid the jury to a correct conclusion, and where this training and experience was acquired by the use and operation of machines of like kind and make, identical in principle, structure and operation; and though the witnesses had not had personal observation of the very machine which was the immediate subject of inquiry. *Tire Setter Co. v. Whitehurst*, 446.

31. *Negotiable Instruments — Drafts, Acceptance of — Rights of Holder in Due Course—Consignor and Consignee.*—After a draft for the purchase price of goods, with bill of lading attached, has been accepted by the drawee, the amount previously paid therefor by a holder in due course becomes a new and binding consideration, giving such holder a position superior to the original contract rights between the consignor and consignee, and to any defenses existent between them. *Mason v. Cotton Co.*, 492.

32. *Breach—Measure of Damages—Matters in Diminution—Pleadings—Burden of Proof.*—When it is established that defendant contracted with plaintiff for the latter to furnish special goods to be manufactured, and the defendant has wrongfully refused to take them, the damages sustained by the plaintiff is the difference between what it would have cost the plain-

CONTRACTS—*Continued.*

tiff to carry out its part of the contract and the contract price, in the absence of averment and proof by defendant of any fact in diminution of the damages, the burden being on defendant. *Springs Co. v. Buggy Co.*, 533.

33. *Interpretation—Sale of Goods Delivered—Pleadings—Allegation and Proof—Evidence.*—An accepted offer by letter of vendor for goods to be delivered sometime in October or November, at vendee's option, at a certain price, further stated that a definite time for delivery could not be fixed, owing to the uncertainty of water transportation. In a letter of acceptance the vendee requested that shipment be made between November 1st and 10th. It was agreed that shipment should be made by vessel. Vendee sued for damages arising from delay, alleging delivery was to have been made between November 1st and 10th. The correspondence was in evidence and no amendment of complaint was requested: *Held*, (1) there was a fatal variance between the allegation and proof; (2) there was no definite time fixed in which the goods were contracted to be delivered. *Sumrell v. Salt Co.*, 552.

34. *Sale of Goods Delivered—Indefinite as to Time of Delivery—Pleadings—Allegation and Proof.*—When it is stated by vendor, in the course of the correspondence establishing a contract for the sale of goods at a price delivered by vessel, that vessels were scarce, but he would be on the outlook and ship at the earliest possible moment, and nothing appears to indicate that the contract of sale was made upon a different basis, in an action for damages alleged to have accrued on account of delay, it was necessary for vendee to allege and prove, to sustain his action, that the first available vessel was not used by vendor for the shipment. *Ibid.*

CONTRIBUTION. See Mortgagor and Mortgagee, 5.

CONTRIBUTORY NEGLIGENCE.

1. *Railroads—Coupling Cars—Nonsuit.*—When, as a necessary consequence in coupling together freight cars onto a train, the engine must back upon them to take up slack, it is contributory negligence on the part of the conductor to signal the engine for this purpose and then go at once between the cars to couple together the air-brake hose beneath them, when from his experience he knew of the danger of doing so; and upon such evidence by plaintiff a motion of nonsuit should be granted. *Dermid v. Railroad*, 180.

2. *Same—Safe Methods.*—When there is a safe and usual way and an unsafe way to couple cars to a freight train, and a conductor of long experience, having knowledge of the usu-

CONTRIBUTORY NEGLIGENCE—*Continued.*

ally safe way, assumes to act therein for the brakeman, whose duty it was, but in the manner known by him to be dangerous, his thus acting will bar a recovery in a suit for damages for injury thereby caused to him. *Ibid.*

3. *Railroads—Employer and Employee—Dangerous Spur Tracks—Moving Cars—Proximate Cause.*—Contributory negligence on the part of deceased employee in not fastening the brakes to a car before endeavoring to couple it to the engine on a down grade spur track, and jumping upon the car in order to save it when it was in rapid motion, is not the proximate cause of his death, when it appears that the death resulted from a derailment, owing to the fact, unknown to deceased, that the rails were out of alignment. *Dortch v. Railroad*, 575.

CONVERSION. See Wills, 2.

COPRINCIPAL. See Negotiable Instruments, 1.

CORPORATE ACTS. See Corporations, 4.

CORPORATIONS. See Municipal Corporations, 1.

1. *Acts of Officers—Contracts to Purchase—Seal Unnecessary.*—A president of a corporation has authority to sign an order for machinery for its use, wherein it is contracted that the title shall remain in the vendor until full payment has been made, and it is not necessary to affix the corporate seal thereto. *Mershon v. Morris*, 48.

2. *Acts of Officers—Presumptions—Evidence.*—When the appropriate officer or agent of a corporation executes a contract in its behalf for the purchase of machinery for its use, which the corporation is lawfully authorized to make, a preceding authority for the act of the officer or agent is presumed, and evidence thereof from the records of the company is unnecessary. *Ibid.*

3. *Contracts—Receiver's Title.*—Under a contract by a corporation to purchase certain machinery for its use, reserving the title in the vendor till paid, a receiver subsequently appointed takes only such title as the corporation had. *Ibid.*

4. *Pleadings—Act Alleged—Directors.*—When it is alleged in the complaint and admitted in the answer that the wrong complained of was caused by the act of the corporation, no question is presented of an excess of power exercised by the board of directors. *Victor v. Mills*, 107.

5. *No Right to Insure Officers—Presumption of Powers.*—A corporation formed for the purpose of manufacturing cotton

CORPORATIONS—*Continued.*

goods has no power to insure the life of its president for its benefit and pay the premiums, in the absence of express legislative provisions therefor, and the presumption is against such power. *Ibid.*

6. *Same—Stockholders—Injunction.*—When it appears that a corporation engaged in manufacturing cotton goods has taken out and carried insurance on the life of its president for its benefit, on account of the peculiar value of his services, and his relationship with the company has ceased, a stockholder may enjoin the further payment by the corporation of premiums on the policy. *Ibid.*

7. *Subscription Note—False Representations—Defenses—Laches.* While one who has subscribed to the stock of a corporation and given his note therefor may, as a valid defense to an action by the trustee in bankruptcy subsequently appointed, set up that the note was given by reason of false and fraudulent representations on the part of the president as to solvency, when the company at the time in question was insolvent, he must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation. *Chamberlain v. Trogden*, 139.

8. *Same—Questions for Jury.*—In a suit by a trustee in bankruptcy on a note given for the purchase price of shares of stock in a corporation insolvent at the time, when the defense is that the subscription was induced by fraudulent misrepresentations of the corporation's president that the company was solvent, evidence upon the question of laches of the subscriber should be submitted to the jury, which tends to show that the subscriber was fifty-three years old, a man of affairs, lived in the vicinity, knew when he made the subscription that the corporation had given indications of weakness and had for a time been in the hands of a receiver; that cursory examination of the books, accessible to him, would have disclosed that, of $25,000 of stock issued, only $4,300 had been paid in; that a large amount of the corporation indebtedness was evidenced by mortgages duly registered, and that he had been told that the company was totally insolvent and likely to go into bankruptcy. *Ibid.*

9. *Contracts, Written—Principal and Surety—Sureties Signing as Officers—Parol Evidence.*—A written contract, expressed in clear and unambiguous terms, which is set up in the complaint and admitted in the answer, and which was made by a corporation and its stockholders, the latter being named as sureties, with a purchaser of stock, stating that upon demand one year from date the corporation will pay a sum certain

CORPORATIONS—*Continued.*

for the stock thus bought, should he (the purchaser) so elect, cannot be varied by parol evidence so as to show that some of the stockholders signed only as officers of the company and not as sureties, though their official signature appeared upon the instrument. (*Typewriter Co. v. Hardware Co.*, 143 N. C., 97, and other like cases, cited and distinguished.) *Basnight v. Jobbing Co.*, 350.

10. *Same—Form of Signature—Effect.*—In the body of a contract made by a corporation, guaranteeing certain conditions to a purchaser of shares of its own certificates of stock, it was stated that the corporation had signed as principal and its stockholders as sureties. Some of the stockholders, who were officers, signed the instrument, using their official designation: *Held*, (1) the form of the signature was unimportant and could not vary the clear intent expressed in the body of the instrument; (2) the intent of the sureties to bind themselves personally was not changed by the form of their signatures, for such a change would make the corporation its own surety, amounting in effect to no surety, as the debts of the corporation would have to be first paid. *Ibid.*

CORPSE. See Measure of Damages, 1; Telegraph Companies, 5.

CORROBORATIVE EVIDENCE. See Evidence, 48.

COUNTERCLAIM. See Pleadings, 3, 4, 18, 19.

COUNTERMAND. See Contracts, 22.

COUNTY COMMISSIONERS.

1. *Taxation for Special Purpose—Ministerial Duties—Injunction.* The courts, at the suit of a taxpayer, will not enjoin a tax levy made by a board of county commissioners in pursuance of their ministerial duty, for that they did not wisely exercise their discretion in fixing a greater rate of taxation on the $100 worth of property than was necessary for the purpose of paying the interest on a special indebtedness of the county, when practically all of the other taxpayers of the county have paid the tax in pursuance of the levy and the statutory limit has not been exceeded. *Railroad v. Commissioners*, 220.

2. *Same—Excess Levy, How Applied.*—When a tax has been levied for the special purpose of paying the interest on special-tax county bonds it must be exclusively applied to that purpose; and if, by any error in the judgment of the county commissioners, a greater property tax rate has been levied than was necessary, the commissioners have no power to apply the excess to a different use. Should they attempt to do so, an injunction will lie at the suit of a taxpayer. *Ibid.*

COUNTY TREASURER. See Mandamus, 5, 6, 7.

COUPLING CARS. See Contributory Negligence, 1. 2; Negligence, 10.

COSTS. See Appeal and Error, 15, 16.

DAMAGES.

1. *Evidence, Competent—Mental Anguish, Present and Prospective.*—Mental suffering arising from a physical injury inflicted is a proper element of damages; and testimony of the injured party that, resulting as an immediate and necessary consequence and a part of his mental suffering, he knew he could never be well again, and that it nearly broke his heart to know he would be a cripple for life, is competent. *Britt v. Railroad*, 37.

2. *Railroads—Right of Way, Construction of—Improper Drainage.*—A railroad company is liable in damages for negligently and improperly stopping the drain ditches on plaintiff's land, so as to injure his crop by the water flowing thereon from his own and adjoining lands, incidental to the building and ditching of its roadbed, though the right of way through plaintiff's land may previously have been purchased or regularly acquired by condemnation proceedings. *Davenport v. Railroad*, 287.

3. *Same—Evidence—Instructions—Accumulated Waters.*—In an action for damages to crops, brought against railroad companies, incident to the negligent construction of the companies' roadbed, whereby the crops of plaintiff were injured by the usual flow of water upon his own and from upper and adjoining lands, there was evidence tending to show that, prior to the building of the roadbed, plaintiff's land was drained by a number of lead ditches into which a number of smaller ditches on his land emptied; that defendants, in constructing their roadbed, crossed all these ditches, leaving openings with pipes in them for the drainage of the lead ditches, but closing the smaller ditches; that for the increase of flow of the water caused by the ditching and construction of the roadbed the pipes for carrying the water off in the lead ditches were insufficient: *Held*, (1) the trial Judge properly instructed the jury, if they believed the evidence, to award damages in full compensation for the injury arising in consequence of the stoppage of the small ditches, and that the openings for the passage of water through the lead ditches should have been sufficient to allow the water to pass through, with adequate piping, and the ditches should have been properly opened for the passage of the water; (2) that defendants had the right to cut a ditch, when necessary, from adjacent lands along their roadbed across plaintiff's

DAMAGES—*Continued.*

land, but it was the duty of the defendants to have the leading and lateral ditches of sufficient capacity to carry off the additional quantity of water thereby caused to flow on plaintiff's land. *Ibid.*

4. *Same.*—A prayer for instruction that a railroad company, in constructing its roadbed, had the right to accumulate the water which would naturally flow onto plaintiff's lands and convey the same by lateral ditches in and upon his lands, concluding, "and for damages incident to this right no recovery can be had," is erroneous, when there is evidence tending to show that there was no sufficient drainage provided by the defendants for carrying it off. *Ibid.*

5. *Trespass—Presumptions—Pleadings—Allegations Sufficient.*—From every action of trespass the law infers some damages, and an allegation that defendant did unlawfully, forcibly, etc., enter upon certain lands in plaintiff's possession and occupation is sufficient to sustain the action. *Brame v. Clark*, 364.

6. *Trespass—Pleadings—Husband and Wife—Attempted Seduction—Aggravation.*—Under an allegation of trespass, in a suit by the husband, coupled with averments that it was with the "unlawful, malicious, lascivious," etc., intent and purpose to seduce, debauch and carnally know the plaintiff's wife, and that defendant did then attempt to seduce and carnally know her, the jury may award exemplary damages to the husband, under pertinent evidence, in aggravation of the actual damages caused by the mere act of trespass. *Ibid.*

7. *Trespass—Husband and Wife—Seduction Attempted—Right of Husband to Recover — Constitutional Law.* — The statutory and constitutional enlargement of the property rights of the wife does not affect the rights of the husband, in an action of trespass upon his home upon the wife's land, with the intent and attempt to seduce or carnally know her. *Ibid.*

8. *Cities and Towns—Grading Streets—Abutting Owner—Liability of City.*—Revisal, sec. 2930, provides that the commissioners shall keep the streets, etc., of a town in repair, "in such manner and to the extent they deem best, and cause such improvements in the town to be made as may be necessary." Therefore, when the commissioners of a town, in the exercise of these powers, cause in their discretion grading of the streets or sidewalks to be made, whereby the value of plaintiff's property has been decreased, the plaintiff cannot recover of the town therefor, in the absence of statutory provision for compensation, if the commissioners have acted with due care and skill. *Dorsey v. Henderson*, 423.

DAMAGES—*Continued.*

9. *Judgment — Evidence — Nonsuit — Substantial Instructions.*— When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from a breach of contract, a motion as of nonsuit upon the evidence will not be sustained upon the theory that no substantial damages have been shown. The question as to a substantial recovery must be raised by a prayer for instruction. *Edwards v. Erwin*, 429.

10. *Pleadings—Demurrer—Principal and Agent—Sales Agent Furnished.*—When it is alleged that defendant was to furnish plaintiff an experienced and successful sales agent for goods sold to it, and damages are claimed on account of the agent furnished having run away with plaintiff's horse and buggy and embezzled its funds, but it is not alleged that defendant knew that the character of the agent was bad, a demurrer to the complaint should be sustained. The agent furnished by the defendant became the plaintiff's agent alone when it employed him. *Slaughter v. Machine Co.*, 471.

11. *Telegraph Companies — Proximate Cause — Notice of Importance of Message.*—In an action against a telegraph company for its wrongful failure to deliver a message to the wife of the sender informing her that he was in a railroad wreck, but not hurt, it was shown that in fact the sender was hurt in the wreck; that he informed the company's agent at the time the message was sent that he knew his wife would hear of the wreck and spend a miserable night; that the message was not delivered until the next morning, and the wife passed a night of mental anguish, having heard of the wreck of the train on which she expected her husband and not having been able to hear with certainty as to his condition, though she heard that he was hurt: *Held*, (1) the notice given to the agent at the time the message was filed for transmission was sufficient for a recovery of damages against the company for the mental anguish sustained that night by the wife; (2) that the negligence of the company was the proximate cause of the injury. *Suttle v. Telegraph Co.*, 480.

12. *Penalty Statute—Separable Causes.*—Actions against a carrier for damages arising from goods damaged or lost while in its possession, and for the penalty for delay of carrier in settlement within sixty days after claim has been filed, etc. (Revisal, sec. 2634), are separable causes. *Albritton v. Railroad*, 485.

13. *Penalty Statutes—Failure to Pay Claim—Accepting Payment—Waiver—Suit for Penalty.*—The consignee, by accepting from the carrier the full amount claimed as damages to or loss of

DAMAGES—*Continued.*

goods while in its possession, does not waive his right of action to recover the penalty for failure of the carrier to adjust and pay the amount within the time limited after claim has been filed, etc., under Revisal, sec. 2634. *Ibid.*

14. *Railroads—Rights of Way—Ejectment—Parties—Permanent—Pleadings.*—In an action for damages against a railroad company for unlawfully entering upon lands of plaintiffs and wrongfully occupying them for a right of way, it appears that one of the plaintiffs had, previously to the commencement of the action, conveyed the land to his coplaintiffs, who reconveyed it to him thereafter; further, that the company had entered on, constructed and was operating its railroad on the *locus in quo*. The plaintiffs, who were the owners of the land at the time of the commencement of the action, filed no complaint: *Held*, (1) damages for the entire wrong—past, present and prospective—should be had in one action, and on payment thereof by the company an easement passed to it, as in proceedings in ejectment; (2) it was necessary to retain all the parties to the action in order to protect the defendant from other and further recoveries for the same cause, though the court would not compel those of the plaintiffs who had not done so to file complaints; (3) the company could not be ousted by an action of ejectment. *Porter v. Railroad*, 563.

15. *Carriers of Goods—Stock—Carrier's Possession—Liability as Carrier—Evidence—Burden of Proof.*—In an action against a carrier for damages to shipment of stock it was shown, without contradiction, that the carrier's agent could not find the consignee, and procured, without plaintiff's requesting it, a stable keeper to take care of the stock; that the stock was apparently in good order upon arrival, but the next morning one mule was dead—apparently had died from being trampled upon: *Held*, (1) the liability of carriers, as such, continues for a reasonable time after transportation ceases, and it was not error in the trial Judge to instruct the jury, if they believed the evidence, to find that the mule was injured while in the carrier's possession; (2) a *prima facie* case of negligence was made out against the carrier, and the burden was upon the carrier at least to introduce evidence tending to show it had discharged its duty. *Jones v. Railroad*, 580.

16. *Carriers of Goods—Reasonable Stipulations—Stock—Agreed Valuation.*—A voluntary agreement by the shipper with the carrier, in consideration of a reduction in the rate of freight, that in case of loss or damage to the stock shipped the valuation thereof shall not exceed $100 a head, is valid as fixing

DAMAGES—*Continued.*

in good faith a stipulated and reasonable value for a species of property of uncertain value, concerning which, in case of loss, the carrier would be without evidence. *Ibid.*

17. *Carriers of Goods—Stock—Notice of Claim—Reasonable Stipulations.*—A stipulation in a contract of carriage that, in consideration of a reduction of freight rate for the carriage of stock, the consignee should give notice in writing of any claim for loss or damage to some officer of the carrier or its nearest station agent, before the stock is removed from its place of destination or mingled with other stock, is reasonable and just, intended to prevent fraud and imposition, and therefore valid, though unavailable as a defense in this case, as it is shown that the stock had not been removed from the carrier's possession. *Ibid.*

DEBT. See Bond Issues, 3, 4.

DECLARATIONS. See Evidence, 56.

DEDICATION. See Cities and Towns, 11.

DEEDS AND CONVEYANCES.

1. *Probate, Time for, Not Limited.*—A deed duly executed prior to January, 1889, can be admitted to probate, under chapter 147, Laws 1885 (now Revisal, sec. 980), as no limitation of time for registration is therein specified. *Cozad v. McAden*, 10.

2. *Execution Prior to 1886—Registration 1893—Statute Applicable.*—A deed executed prior to 1 January, 1886, and offered for probate and registration in April, 1893, is governed in that respect by The Code, sec. 1250. *Ibid.*

3. *Probate Without Adjudication Defective.*—The probate of a deed is defective, under The Code, sec. 1250, which lacks the adjudication therein required, that it had been duly acknowledged or proven. *Ibid.*

4. *Certificate of Commissioner—Revisal, ch. 37—Requirements of Registration.*—A deed registered in the proper county upon the certificate of a commissioner of deeds from another State must have the *fiat* from the clerk ordering it to be registered, or the registration will be invalid, under Revised Code, ch. 37, sec. 5. This defect is not cured by Revisal, sec. 1022. *Ibid.*

5. *Construction — Entirety — Intent.* — In construing a deed the court will examine the entire instrument and construe it as a whole, consistent with reason and common sense, to effectuate the intention of the parties. *Featherston v. Merrimon*, 199.

DEEDS AND CONVEYANCES—*Continued.*

6. *Descriptive Words—Reservation—"Retain."*—When in a deed describing by boundaries the land therein conveyed the words, "including a lot given to S. C. W., which is still retained," are used, the clear meaning of the word "retain" excludes the conveyance of that part of the lands, and title passes only to the land within the larger boundaries, exclusive thereof. *Ibid.*

7. *Property of Another—Intent—Presumptions.*—In the construction of a deed the presumption is that the grantor does not intend to convey property of another contained with the description of the land conveyed. Such intent must clearly appear. *Ibid.*

8. *Trusts and Trustees—Parties—Estoppel.*—A deed made by one assuming to act as trustee for the benefit of his grantor's wife and children, under a deed in trust not executed by the wife, does not by its recitals estop the wife, when not a party thereto, from claiming title to her land embraced therein. *Ibid.*

9. *Trusts and Trustees—Husband and Wife—Tenant by the Curtesy—Wife's Land—Deed of Husband—Intent Presumed—Wife's Estoppel.*—A trustee for the wife, under a deed from the husband which was not executed by the wife, conveyed certain lands to N. upon the same uses and trusts. The husband and wife separated during the year in which the deed was made. The land conveyed was by given boundaries, but the description contained these words: "including the lot given to the wife by her father (which is still retained by her)." The husband had an interest in his wife's land as tenant by the curtesy. The wife was not a party to the deed: *Held*, (1) if it be conceded that the lot spoken of as "retained" by the wife passed by the description, the law will presume that only such interest as the husband had therein was, or was intended by him to be, conveyed; (2) as to the wife, there was no estoppel created so as to pass her estate. *Ibid.*

10. *Descriptive Words—Husband and Wife—Trusts and Trustees—Judgment, Construction of—Estoppel—Injunction.*—In an action to remove a trustee created under the husband's deed of trust for the benefit of the wife and children, it was established by the verdict of the jury, upon the issues submitted, that certain lands of the wife embraced in the boundaries of the said deed were not by the use of the language "including," etc., "(which is still retained)," included in the conveyance. Judgment was rendered reciting the issues and verdict thereon, using the same descriptive words of the land as

used in the trust deed. The present action is by the child to enjoin the sale, under a subsequent mortgage, of the wife's land thus excluded in the former judgment from the operation of the trust deed: *Held*, that, construing the former judgment as an entirety, (1) it was not intended by the court to divest the wife of her title to the land by reason of the use in the judgment of the description contained in the trust deed; (2) the use of the descriptive language by the court, under the circumstances, adopting the description contained in the trust deed, evidenced his opinion that the wife's land was excluded; (3) the plaintiff in this action is estopped by the former judgment to claim any interest in the land mortgaged by the wife; (4) a restraining order upon these facts should be dismissed. *Ibid.*

11. *Trusts and Trustees—Foreclosure Proceedings—Failure to Redeem—Equitable Remedies.*—Under a consent decree it was admitted that the vendee held the land in controversy in trust to pay an obligation to him of the vendor in a specified sum, and adjudged that the vendor have the amount of the rents and profits credited thereon, ascertained by a reference to be in a certain sum. The court thereupon adjudged that the land be sold by a commissioner, authorizing him to make title, and who, in pursuance thereof, made title to the said vendee: *Held*, (1) that the vendor was estopped from contending for a recovery as to new credits set up for waste, except such as were not conclusively settled by the judgment; (2) that by the consent decree the action virtually became one to foreclose a mortgage; (3) that there was no error in the order of the trial Judge that the land be sold and the equities administered upon the failure of the vendor to redeem within the time specified in the decree. *Bradburn v. Roberts*, 214.

12. *Cities and Towns—Streets—Dedication—Revocation—Description—Evidence—Nonsuit.*—C. was the owner of two certain town lots abutting on A. Street, numbers 37 and 38, from whom plaintiff claims under *mesne* conveyances. A. Street had been laid off and designated on a map of the town, but had never been used for street purposes. C., prior to conveying the lots, obtained a quitclaim deed from the town to A. Street under legislative authority, which subsequently came by *mesne* conveyances to defendants. In making the deed to the two lots under which plaintiff claims, the following calls were given: to "a stake, the old S. West corner of lot 37, on the edge of old A. Street; thence with the line of lot 37," etc.: *Held*, (1) that the deed of A. Street to C. from

DEEDS AND CONVEYANCES—*Continued.*

the town was valid and effective, and, though there was evidence of a prior dedication of that street, the deed from the town amounted to a revocation by mutual consent; (2) that the calls in the deed under which plaintiff claims were meant for description only; (3) that the motion for judgment as of nonsuit upon the evidence should have been granted. (*Southport v. Stanly*, 125 N. C., cited and distinguished.) *Church v. Dula*, 262.

13. *Boundaries—Description—Stake.*—A stake is not a natural boundary in the description of a conveyance of land. *Tate v. Johnson*, 267.

14. *Boundaries—Evidence.*—When a call in a deed is for a line running at a certain distance from an ascertained corner to a stake, and the further description of the line is not met, the stake and distance do not control, as a matter of law, when it appears that a survey had been caused to be made of this and an adjoining tract on the same day by the owner of both tracts, including the dividing line in dispute, and this dividing line is identical as to calls, courses and distances in both deeds under which the parties claim. Under such circumstances it is for the jury to find the true location of the disputed line. *Ibid.*

15. *Same—Instructions.*—When the boundary line between two lots of land lying east and west of each other is in dispute, and the owner had a plat of them made on the same day, in which the western one was numbered "one" and the eastern one numbered "two," and a subsequent conveyance was made by him of yet another lot, the deed to which was put in evidence for the purpose of establishing the southeast corner of lot numbered one, described as "lying south of the first, beginning at a yew pine, southeast corner of said survey, running west with said line 90 chains to a stake," it was error in the court to charge the jury in effect that the third lot lay south of the first and establish the corner thereof at a certain place at which there was no yew pine, it further appearing that by running the distance of 90 chains from the southeast corner of lot No. 2 it would include its southern boundary and fit in with the further calls in the deed. *Ibid.*

16. *Adverse Possession — Color — Instructions — Descriptions.* — When, for the purpose of establishing a dividing line between adjoining owners of land derived from a common source holding a grant from the State, a deed is introduced to show title to the disputed land under "color" and adverse

possession, with full description, it was error in the court below to instruct the jury that the description in the deed must be followed, when the deed recites that the tracts were those originally granted by the State to the common grantor. 1. It was competent for the jury to have the description in the grant to aid them in locating the corners and lines of the deeds. 2. If there was a discrepancy upon the evidence the jury should reconcile it, or they may find the more reliable description to be in the grants. 3. If upon the whole evidence the descriptions of the deeds are found to be irreconcilable with those of the grants, those in the deeds would control. *Ibid.*

17. *Executors and Administrators—Foreign Executors—Bond—Statutory Requirements—Interpretation of Statutes.*—Under Revisal, sec. 28, declaring that "no foreign executor has any authority to intermeddle with the estate until he shall have entered into a bond" within a year from the testator's death, deeds made by foreign executors to lands in this State, under a power in the will to sell, convey no title until the statutory requirements have been complied with. *Glascock v. Gray*, 346.

18. *Same—Administrator—Mortgagor and Mortgagee—Vendor and Vendee.*—Plaintiffs, in an action to enforce specific performance of a contract to convey lands, made by deceased and his wife, brought suit against the wife as executrix of her husband, and obtained judgment that the administratrix execute and deliver a deed to him upon payment of the purchase money on a specified day, and in default the lands be sold at public auction for cash, etc., naming a commissioner; also, that the case be retained for further consideration of questions raised by the pleadings in regard to the disposition of the purchase money. The case was inadvertently dropped from the docket by the Clerk, and at a subsequent term reinstated, on defendant's motion, the Judge finding that the administratrix failed to advertise the land as directed, but had since then made a deed to plaintiff upon payment by him of purchase money: *Held*, (1) the judgment, in effect, was to declare the holders of the legal title trustees to secure the purchase money and pay remainder to plaintiff, and by the administratrix accepting the money, the same result would follow upon equitable principles, and her deed would be valid; (2) the decree of sale of the land as made by the court was a proper one, as the relation of vendor and vendee under such conditions is, for all practical purposes, that of mortgagor and mortgagee. *Jones v. Jones*, 358.

DEEDS AND CONVEYANCES—*Continued.*

19. *Deed in Escrow—Action for Possession—Procedure.*—An action for the possession of a deed to lands held in escrow, alleging the fulfillment of the conditions thereof, involves the title to lands, not merely the delivery of the deed, and the ancillary or provisional remedy of claim and delivery will not lie. *Bridgers v. Ormond*, 375.

20. *Same—Judgment—Title—Jurisdiction—Removal of Causes.*—The effect of a verdict and judgment in an action for the delivery of a deed held in escrow, determining that the conditions thereof have been complied with, will be to transfer, not simply the deed, but the actual title to the land. If the deed should be destroyed, the judgment could be made to operate as a deed, or the court could decree the execution of another. Hence it was not error in the court below to order that the cause be removed to the county wherein the land is situated. (*Pasterfield v. Sawyer*, 132 N. C., 258; *s. c.*, 133 N. C., 44, cited and distinguished.) *Ibid.*

21. *Color—Boundaries—Presumption of Possession.*—A claimant to disputed lands, having failed to connect his chain of title, is presumed to have possession coextensive with the boundaries of the deed under which he claims, when there is no claim of adverse possession by another of any part of the land so described. *Haddock v. Leary*, 378.

22. *Same—Agreed Dividing Line.*—The claimant to lands under color of title will not be presumed to be in possession thereof coextensive with the boundaries of the deed under which he claims, when it is made to appear that, by agreement of the one under whom he claims and within the statutory time, a division line was run, excluding therefrom the land in dispute. *Ibid.*

23. *Same—Evidence in Rebuttal—Questions for Jury.*—When adverse possession has ripened the title to that part of the land in dispute, and within the boundaries of the deed under which it is claimed, a dividing line afterwards agreed to by parol cannot divest it. But when the title is not so established, and not established by a connecting chain thereof by deed, evidence that such line has been established by agreement with the one under whom the claim is made within the statutory time, is competent to go to the jury to rebut the presumption that claim of possession was coextensive with the boundaries of the deed, and the effect is the same, whether the line was mistakenly or knowingly located. *Ibid.*

24. *Title — Common Source — Rule of Convenience.* — When both parties to an action for the possession of land claim title from a common source, the plaintiff is not required to show title out of the State. *Warren v. Williford*, 474.

DEEDS AND CONVEYANCES—*Continued.*

25. *Same—Evidence—Superior Title.*—When both parties to an action for the possession of land claim title from a common source, one of them is not estopped to show a superior outstanding title, provided he connects himself with such title. *Ibid.*

26. *Same—Tax Deed—Instruction.*—When a party to an action for possession of land introduces deeds for the purpose of showing legal title in himself, and also a tax deed held by the defendant to the land, for the purpose of impeaching it, which shows title from a common source with him, it is not error in the trial Judge to instruct the jury that the ownership of the land depends upon the validity of the tax deed. *Ibid.*

27. *Tax Deeds—Validity—Presumptions—Burden of Proof.*—One relying upon a tax deed for title to lands must show that the statutory requirements necessary to the validity of the deed have been met, for there is no legal presumption in favor of the validity of the deed otherwise than the statute provides. *Ibid.*

28. *Mortgagor and Mortgagee—Equity of Redemption, Agreement to Surrender—Void Conditions.*—Immediately after the *habendum* clause in a paper-writing, called by the parties a deed, it was stated that the writing was to be null and void upon the maker's paying a sum certain, with interest, at a specified time, and on the margin thereof a provision that, if the grantee pay a certain sum at the time specified, the "deed" was to be null and void. No power of sale was contained in the deed. *Held*, (1) the deed is a mortgage upon its face; (2) an agreement made by the mortgagor, at the time of the execution of a mortgage, to surrender the equity of redemption for a consideration then fixed to be paid at maturity, is invalid. *Wilson v. Fisher*, 535.

29. *Same—Mortgagee in Possession—Permanent Improvements—Reference.*—When the mortgagee has been in peaceful possession of the mortgaged premises for a long time, claiming them as his own by reason of payment of a certain fixed sum for the equity of redemption provided for by the terms of the instrument, it is within the equity jurisdiction of the court, in an action to redeem, to permit him to offset against the rents and profits the increased value of the lands, owing to permanent improvements he has put on them, and a reference is proper to state an account between the parties. *Ibid.*

DEFENSES. See Stockholders, 1, 2; Negligence, 12, 13.

DELIVERY. See Carriers of Freight, 11, 12.

DELIVERY OF GOODS. See Contracts, 33, 34.

DEMURRER.

1. *Quo Warranto—Judgment Upon Pleadings.*—When the Judge in the lower court renders judgment upon the pleadings restoring the relator in *quo warranto* to his office, the proceedings are in the nature of judgment upon demurrer, in which the allegations must be taken as true. *Burke v. Jenkins*, 25.

2. *Pleadings—Contracts Assumed for Performance.*—A demurrer to a complaint, in an action for damages for breach of contract, for that it does not allege a contract or agreement between the parties to the suit, though not frivolous, will not be sustained when it is alleged that the defendant had taken over the contract made by others with the plaintiff, and had expressly agreed with him to fully perform it, and failed to comply with such agreement. *Younce v. Lumber Co.*, 34.

3. *Pleadings — Cause Defectively Stated — Amendments.*—A demurrer will not be sustained to a complaint merely because a cause of action is defectively stated, which may easily be remedied by amendment, if necessary. *Poythress v. Railroad*, 391.

4. *Trespassers — Personal Injury — Children — Invitation, Expressed or Implied—Pleadings.*—Owners in possession of lands are not liable to trespassers for injuries received from conditions arising from the lawful use thereof for manufacturing or other lawful purposes; and a complaint alleging that the electrical plant on defendant's premises was alluring or attractive to boys, and the plaintiff, a boy of thirteen years of age, was injured while going through an opening between two buildings on defendant's land, by falling into a well of hot water negligently covered over, used in the conduct of defendant's business, and there is no allegation that boys usually passed the place where the injury was occasioned or were in the habit of frequenting the defendant's premises on account of its attractiveness, or that invitation, expressed or implied, had been extended by defendant, the plaintiff was a trespasser, and defendant is not responsible for his act thereof, and a demurrer will be sustained. *Briscoe v. Lighting and Power Co.*, 396.

5. *Pleadings — Principal and Agent — Sales Agent Furnished — Damages.*—When it is alleged that defendant was to furnish plaintiff an experienced and successful sales agent for goods sold to it, and damages are claimed on account of the agent furnished having run away with plaintiff's horse and buggy

DEMURRER—*Continued.*

and embezzled its funds, but it is not alleged that defendant knew that the character of the agent was bad, a demurrer to the complaint should be sustained. The agent furnished by the defendant became the plaintiff's agent alone when it employed him. *Slaughter v. Machine Co.*, 471.

6. *Pleadings—Contracts—Counterclaim, When Available.*—In an action for damages claimed by reason of embezzlement by a sales agent furnished to plaintiff by defendant, it is admissible, under Revisal, sec. 481, for defendant to set up a counterclaim for the price of the machines it was alleged that the agent was furnished to sell, though the price for a part of the machines became due after the commencement of the action; for the counterclaim is a cause of action connected with the subject-matter of the action, and one arising on contract and existing at the commencement of the action on the contract. *Ibid.*

DESCRIPTION. See Condemnation Proceedings, 1; Deeds and Conveyances, 12, 13; Supplemental Proceedings, 2.

DESCRIPTIVE WORDS. See Deeds and Conveyances, 6.

DEVISAVIT VEL NON. See Wills, 9.

DIRECTORS. See Corporations, 4.

DISCHARGE. See Negotiable Instruments, 3.

DISCRETION. See Pleadings, 10.

DISCRETIONARY POWER. See Power of Court, 2.

DISHONOR. See Negotiable Instruments, 3.

DISPUTE AS TO LOCATION. See State's Lands, 1.

DISSOLUTION. See Partnerships, 4.

DIVIDING LINE. See Deeds and Conveyances, 22.

DOCKETING JUDGMENT. See Jurisdiction, 6.

DRAFT, BILL OF LADING ATTACHED. See Negotiable Instruments, 5, 6, 7.

DRAINAGE. See Railroads, 9, 10, 11, 12; Water and Water Courses, 1, 2.

DUTY OF COURT. See Power of Court, 1.

EJECTMENT.

Railroads — Rights of Way — Parties — Permanent Damages — Pleadings.—In an action for damages against a railroad company for unlawfully entering upon lands of plaintiffs and

EJECTMENT—*Continued.*

wrongfully occupying them for a right of way, it appears that one of the plaintiffs had, previously to the commencement of the action, conveyed the land to his coplaintiffs, who reconveyed it to him thereafter; further, that the company had entered on, constructed and was operating its railroad on the *locus in quo*. The plaintiffs, who were the owners of the land at the time of the commencement of the action, filed no complaint: *Held*, (1) damages for the entire wrong—past, present and prospective—should be had in one action, and on payment thereof by the company an easement passed to it, as in proceedings in ejectment; (2) it was necessary to retain all the parties to the action in order to protect the defendant from other and further recoveries for the same cause, though the court would not compel those of the plaintiffs who had not done so to file complaints; (3) the company could not be ousted by an action of ejectment. *Porter v. Railroad*, 563.

EMPLOYER AND EMPLOYEE. See Master and Servant, 1, 2.

ENDORSER. See Negotiable Instruments, 3.

ENTIRETY. See Deeds and Conveyances, 5.

ENTRY. See State's Lands, 1.

EQUATION OF TAXATION. See Constitutional Law, 10, 11.

EQUIPMENT, MODERN. See Negligence, 9, 11.

EQUITY OF REDEMPTION. See Mortgagor and Mortgagee, 9.

ESCROW. See Deeds and Conveyances, 19.

ESTOPPEL.

1. *Deeds and Conveyances—Trusts and Trustees—Parties.*—A deed made by one assuming to act as trustee for the benefit of his grantor's wife and children, under a deed in trust not executed by the wife, does not by its recitals estop the wife, when not a party thereto, from claiming title to her land embraced therein. *Featherston v. Merrimon*, 199.

2. *Deeds and Conveyances—Trusts and Trustees—Husband and Wife—Tenant by the Curtesy—Wife's Land—Deed of Husband—Intent Presumed.*—A trustee for the wife, under a deed from the husband which was not executed by the wife, conveyed certain lands to N. upon the same uses and trusts. The husband and wife separated during the year in which the deed was made. The land conveyed was by given boundaries, but the description contained these words: "including the lot given to the wife by her father (which is still re-

ESTOPPEL—*Continued.*

tained by her)." The husband had an interest in his wife's land as tenant by the curtesy. The wife was not a party to the deed: *Held*, (1) if it be conceded that the lot spoken of as "retained" by the wife passed by the description, the law will presume that only such interest as the husband had therein was, or was intended by him to be, conveyed; (2) as to the wife, there was no estoppel created so as to pass her estate. *Ibid.*

3. *Deeds and Conveyances—Descriptive Words—Husband and Wife—Trusts and Trustees—Judgment, Construction of—Injunction.*—In an action to remove a trustee created under the husband's deed of trust for the benefit of the wife and children it was established by the verdict of the jury, upon the issues submitted, that certain lands of the wife embraced in the boundaries of the said deed were not by the use of the language "including," etc., "(which is still retained)," included in the conveyance. Judgment was rendered reciting the issues and verdict thereon, using the same descriptive words of the land as used in the trust deed. The present action is by the child to enjoin the sale, under a subsequent mortgage, of the wife's land thus excluded in the former judgment from the operation of the trust deed: *Held*, that, construing the former judgment as an entirety, (1) it was not intended by the court to divest the wife of her title to the land by reason of the use in the judgment of the description contained in the trust deed; (2) the use of the descriptive language by the court, under the circumstances, adopting the description contained in the trust deed, evidenced his opinion that the wife's land was excluded; (3) the plaintiff in this action is estopped by the former judgment to claim any interest in the land mortgaged by the wife; (4) a restraining order upon these facts should be dismissed. *Ibid.*

EVIDENCE.

1. *Duty of Company—Nonsuit.*—Upon plaintiff's evidence, tending to show that a telegram was addressed to No. 38 D. Street, where it could not have been delivered, and when the addressee lived in the rear of No. 83 D. Street, where delivery could have been made, and defendant introduced no evidence, it was error in the trial Judge to sustain a motion as of nonsuit upon the evidence, as it then was incumbent upon the defendant to show such reasonable inquiry and the exercise of that degree of care required of it under the circumstances to excuse the failure to deliver. *Woods v. Telegraph Co.*, 1.

EVIDENCE—*Continued.*

2. *Telegraph—Negligence—Message—Wrong Address—Delivery—Reasonable Efforts—Idem Sonans.*—When a telegram was addressed to the wrong street number, where it could not have been delivered, it was incumbent upon the defendant to use such reasonable efforts to deliver it as required when no number is given; and the city directory containing the name of addressee, of Jay Wood for Jay Woods, with his correct address, it is sufficient evidence of negligence for the jury to consider. *Ibid.*

3. *Tenants in Common—Lands Sold—Purchase by Tenant—Debt of Ancestor—Interest Acquired.*—Evidence that S. bought the land held by tenants in common by inheritance, which was sold to pay debts of the ancestor, for and in behalf of one of the tenants, and made deed to him therefor, is insufficient to establish that he thereby holds it in trust for the others or that the legal or equitable title thus acquired must inure to the joint benefit of them all, when there is no evidence of suppression of bids or that the sale was not fairly conducted. *Jackson v. Baird*, 29.

4. *Negligence—Nonsuit.*—In an action for damages occasioned by an injury received by reason of a motorcycle frightening a horse so that it then ran over plaintiff, a motion as of nonsuit upon the evidence should be allowed, when it appears from unconflicting testimony that the horse gave no indication of fright until he was nearly up to the defendant; that the defendant stopped the noise of the machine as soon as he saw the horse, a distance of about 150 yards, and that the machine was standing still when the horse ran over plaintiff and injured him. *Long v. Warlick*, 32.

5. *Explanatory Models.*—A model may be used by a witness to illustrate his evidence, and when not admitted to be correct it is to be taken in connection with his evidence, and as such to be passed upon by the jury. *Britt v. Railroad*, 37.

6. *Damages—Evidence, Competent—Mental Anguish, Present and Prospective.*—Mental suffering arising from a physical injury inflicted is a proper element of damages; and testimony of the injured party that, resulting as an immediate and necessary consequence and a part of his mental suffering, he knew he could never be well again, and that it nearly broke his heart to know he would be a cripple for life, is competent. *Ibid.*

7. *Expert Evidence — Opinion, What is Not.* — Testimony of a witness concerning a physical fact peculiarly within his own knowledge is not objectionable as expert evidence from a witness who was not legally qualified as an expert. *Ibid.*

EVIDENCE—*Continued.*

8. *Same.*—It is competent for a nonexpert witness to testify that, and to explain why, a double chain would have been safer for the plaintiff to do the work within his employment than a single one which was being used by him at the time of the injury, as being within his own knowledge and observation. *Ibid.*

9. *Same — Safe Appliances — Harmless Error.*— When the testimony of a nonexpert witness is objected to on the ground that it is opinion evidence, and it appears that it was competent upon the question of showing whether a certain appliance furnished by an employer to an employee with which to do his work is approved and in general use, the error, if any committed, is harmless. *Ibid.*

10. *Exceptions, When Taken.*—When it appears that the testimony objected to could have been sustained as that of an expert, objection that the witness did not qualify as such should have been taken on the trial at the time. *Ibid.*

11. *Corporations—Acts of Officers—Presumptions.*—When the appropriate officer or agent of a corporation executes a contract in its behalf for the purchase of machinery for its use, which the corporation is lawfully authorized to make, a preceding authority for the act of the officer or agent is presumed, and evidence thereof from the records of the company is unnecessary. *Mershon v. Morris*, 49.

12. *Nonsuit — Railroads — Trespassers — Negligence.*—When it is shown by the evidence that plaintiff's intestates were trespassers on defendant's railroad track, walking in front of an approaching train in the direction the train was moving; that it was a bright day and the track of defendant was straight at that place; that there was no obstruction to prevent their seeing the train for a distance of from one-half to three-fourths of a mile, or the engineer from seeing them; that the engineer, on approaching, seeing they did not leave the track, sounded the danger signal and applied the brakes in a fruitless effort to avoid killing them; that the engineer saw an engine standing near the place of the accident, and before it occurred, evidently making noises to prevent their hearing the approaching train, a motion as of nonsuit upon the evidence was properly sustained. *Beach v. Railroad*, 153.

13. *Railroads — Negligence — Coupling Cars.* — Evidence of negligence is not sufficient which merely shows that, in obedience to a signal from the conductor, the engineer took up the slack in his train of freight cars and thereby injured the

EVIDENCE—*Continued.*

conductor, who, immediately after signalling, went between the cars unexpectedly for the purpose of coupling them. *Dermid v. Railroad*, 180.

14. *Railroads — Negligence — Modern Equipment — "Bumpers" — Questions for Court.*—When a recovery against a railroad company is sought upon the ground that its train was furnished and equipped with automatic couplers, but that the bumpers had not been removed therefrom; that plaintiff's intestate was injured while coupling the cars as the engine was taking up slack, the mere fact that the bumpers were permitted to remain on the cars raises no question of negligence for the jury, when it appears from the other testimony that the bumpers were then in general use on cars of that character. *Ibid.*

15. *Cities and Towns—Streets—Dedication—Revocation—Description—Nonsuit.*—C. was the owner of two certain town lots abutting on A. Street, numbers 37 and 38, from whom plaintiff claims under *mesne* conveyances. A. Street had been laid off and designated on a map of the town, but had never been used for street purposes. C., prior to conveying the lots, obtained a quitclaim deed from the town to A. Street under legislative authority, which subsequently came by *mesne* conveyances to defendants. In making the deed to the two lots under which plaintiff claims, the following calls were given: to "a stake, the old S. West corner of lot 37, on the edge of old A. Street; thence with the line of lot 37," etc.: *Held*, (1) that the deed of A. Street to C. from the town was valid and effective, and, though there was evidence of a prior dedication of that street, the deed from the town amounted to a revocation by mutual consent; (2) that the calls in the deed under which plaintiff claims were meant for description only; (3) that the motion for judgment as of nonsuit upon the evidence should have been granted. (*Southport v. Stanly*, 125 N. C., 464, cited and distinguished.) *Church v. Dula*, 262.

16. *Deeds and Conveyances—Boundaries.*—When a call in a deed is for a line running at a certain distance from an ascertained corner to a stake, and the further description of the line is not met, the stake and distance do not control, as a matter of law, when it appears that a survey had been caused to be made of this and an adjoining tract on the same day by the owner of both tracts, including the dividing line in dispute, and this dividing line is identical as to calls, courses and distances in both deeds under which the parties

EVIDENCE—*Continued.*

claim. Under such circumstances it is for the jury to find the true location of the disputed line. *Tate v. Johnson*, 267.

17. *Same—Instructions.*—When the boundary line between two lots of land lying east and west of each other is in dispute, and the owner had a plat of them made on the same day, in which the western one was numbered "one" and the eastern one numbered "two," and a subsequent conveyance was made by him of yet another lot, the deed to which was put in evidence for the purpose of establishing the southeast corner of lot numbered one, described as "lying south of the first, beginning at a yew pine, southeast corner of said survey, running west with said line 90 chains to a stake," it was error in the court to charge the jury in effect that the third lot lay south of the first and establish the corner thereof at a certain place at which there was no yew pine, it further appearing that by running the distance of 90 chains from the southeast corner of lot No. 2 it would include its southern boundary and fit in with the further calls in the deed. *Ibid.*

18. *Laches.*—When a mortgagor seeks to set aside a sale made in pursuance of a power given under a mortgage, upon the ground that the mortgagee bought in the trust estate during the continuance of the trust, and the record shows that he had had opportunities to set up the equity thus claimed in various other suits, it is at least suggestive of laches and inconsistent with his present action, though possibly not an estoppel of record. *Dunn v. Oettinger*, 276.

19. *Instructions — Accumulated Waters.* — In an action for damages to crops, brought against railroad companies, incident to the negligent construction of the companies' roadbed, whereby the crops of plaintiff were injured by the usual flow of water upon his own and from upper and adjoining lands, there was evidence tending to show that, prior to the building of the roadbed, plaintiff's land was drained by a number of lead ditches into which a number of smaller ditches on his land emptied; that defendants, in constructing their roadbed, crossed all these ditches, leaving openings with pipes in them for the drainage of the lead ditches, but closing the smaller ditches; that for the increase of flow of the water caused by the ditching and construction of the roadbed the pipes for carrying the water off in the lead ditches were insufficient: *Held*, (1) the trial Judge properly instructed the jury, if they believed the evidence, to award damages in full compensation for the injury arising in consequence of the stoppage of the small ditches, and that the openings for the passage of water through the lead ditches

EVIDENCE—*Continued.*

should have been sufficient to allow the water to pass through, with adequate piping, and the ditches should have been properly opened for the passage of the water; (2) that defendants had the right to cut a ditch, when necessary, from adjacent lands along their roadbed across plaintiff's land, but it was the duty of the defendants to have the leading and lateral ditches of sufficient capacity to carry off the additional quantity of water thereby caused to flow on plaintiff's land. *Davenport v. Railroad*, 287.

20. *Same.*—A prayer for instruction that a railroad company, in constructing its roadbed, had the right to accumulate the water which would naturally flow onto plaintiff's lands and convey the same by lateral ditches in and upon his lands, concluding, "and for damages incident to this right no recovery can be had," is erroneous, when there is evidence tending to show that there was no sufficient drainage provided by the defendants for carrying it off. *Ibid.*

21. *Opinion — "Expert Testimony" Upon the Facts — Improper Drainage—Damages to Crops.*—Testimony of a witness who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion thereon, is competent to show the damage to his crop by reason of an overflow of water on his land, caused by improper construction by defendants of their roadbed thereon, and he may testify to the number of acres in cultivation of each kind of crop, the amount of each he would have made except for the injury, and the price for which he could have sold it. *Ibid.*

22. *Contracts—Conditions Precedent—Parol.*—When a promissory note is given in pursuance of the terms of a written contract, evidence can be introduced of a contemporaneous oral agreement, made as a part thereof, to the effect that the note and contract were executed and given upon a condition precedent to their validity, which has not been performed. This does not vary by parol the terms of the written instrument, but postpones its operation until the happening of the contingency. *Hughes v. Crooker*, 318.

23. *Same—Sufficiency.*—When the defense, in a suit upon a written instrument, is made that it was agreed by plaintiffs' agent that the transaction was incomplete until the agent had done a certain specified service, evidence that the agent told defendant that he was absolutely safe, for the contract was not to be regarded as finished until he, the defendant, signed his satisfaction thereon, which was to be upon the

EVIDENCE—*Continued.*

performance of the condition, is sufficient upon the question as to whether the contract was made upon that condition. *Ibid.*

24. *Contracts—Conditions Precedent, Breach of—Negotiable Instruments — Payment of Note — Measure of Damages.* — A holder of a negotiable instrument who has violated his agreement with the maker by negotiating it without performing a condition precedent to its validity is liable to the maker in such sum as he may have lawfully been compelled to pay thereon to an innocent purchaser for value without notice. *Ibid.*

25. *Penalty Statutes — Carriers of Goods — Defense — Burden of Proof.*—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by Revisal, sec. 2632, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." *Robertson v. Railroad*, 323.

26. *Trespass—Question of Ownership.*—In an action for damages arising upon the alleged negligence of defendant, through which the timber, etc., upon plaintiff's lands, consisting of several tracts, was burned, it was admitted in open court that the plaintiff was the owner and in possession of the land upon which the trespass was alleged to have been committed: *Held*, it was competent upon cross-examination for defendant's counsel to ask the plaintiff, a witness in his own behalf, if a certain tract of the land was not owned by some one else at the time of the fire, as tending to show that he had sold it, and thereby impeach his estimate of the damage he had testified to on his direct examination. *Gay v. Railroad*, 336.

27. *Contracts, Interpretation of—Independent Contractor.*—When a party defendant aptly sets up the defense of independent contractor in relation to his codefendant, and the only evidence thereof is a written contract to that effect, free from ambiguity, the interpretation of the contract involves questions of law alone, and it is error for the trial Judge to charge the jury that the paper-writing does not establish the relation of independent contractor, but they can consider it in finding whether such relationship exists. *Ibid.*

28. *Contracts—Fraud or Mistake, How Taken Advantage of—Collateral Attack in Action Upon—Parol.*—Parol evidence is ad-

EVIDENCE—*Continued.*

missible to vary the terms of a written instrument, only for fraud or mistake, and then the contract must be reformed, upon proper allegations, in an independent action, or by way of affirmative defense, properly pleaded, in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself. *Basnight v. Jobbing Co.*, 350.

29. *Corporations — Contracts, Written — Principal and Surety — Sureties Signing as Officers—Parol.*—A written contract, expressed in clear and unambiguous terms, which is set up in the complaint and admitted in the answer, and which was made by a corporation and its stockholders, the latter being named as sureties, with a purchaser of stock, stating that upon demand one year from date the corporation will pay a sum certain for the stock thus bought, should he (the purchaser) so elect, cannot be varied by parol evidence so as to show that some of the stockholders signed only as officers of the company and not as sureties, though their official signatures appeared upon the instrument. (*Typewriter Co. v. Hardware Co.*, 143 N. C., 97, and other like cases, cited and distinguished.) *Ibid.*

30. *Husband and Wife—Lands—Permissive Occupation—Rent—Year's Support—Liens for Advances—Instructions.*—When, without contract or agreement as to rent, deceased and his wife were occupants of land by permission of the owners, lived with them and were cultivating a crop thereon at the time of his death, having executed to the owners a crop lien not to exceed $121, and at his death his widow was allowed for her year's support the sum of $50 from the proceeds of the crop raised, and her whole allowance did not equal the full amount specified by statute, and the deceased's portion of the value of the crop is more than sufficient to pay the $121 limited in the crop lien and the $50 allowed the widow: *Held*, (1) that the widow could maintain an action for her allowance against the owners of the land in possession of the crops; (2) that the lower court should have instructed the jury according to plaintiff's prayer, there being no evidence of any advances made under the lien bond introduced by defendants, that nothing could be recovered thereunder; (3) that, in the absence of evidence as to the value of the rent, the jury should award nothing on that account. *Sessoms v. Tayloe*, 369.

31. *Rebuttal—Questions for Jury.*—When adverse possession has ripened the title to that part of the land in dispute, and within the boundaries of the deed under which it is claimed, a dividing line afterwards agreed to by parol cannot divest

EVIDENCE—*Continued.*

it. But when the title is not so established, and not established by a connecting chain thereof by deed, evidence that such line has been established by agreement with the one under whom the claim is made within the statutory time, is competent to go to the jury to rebut the presumption that claim of possession was coextensive with the boundaries of the deed, and the effect is the same, whether the line was mistakenly or knowingly located. *Haddock v. Leary*, 378.

32. *Contracts in Writing—Parol—"Vary and Contradict."*—Evidence of an oral stipulation claimed to be made contemporaneously with a written contract, as a part thereof, is incompetent, when in conflict or at variance with the written part. *Medicine Co. v. Mizell*, 384.

33. *Same—Sale of Goods.*—When a contract for the sale of goods is evidenced by a paper-writing, specifying that the order therefor is not subject to countermand, that they will be promptly received, on arrival, by the vendee, and that failure to do so will make payment due on demand, and that there is no agreement, verbal or otherwise, affecting the terms of the order, parol evidence is inadmissible which tends to show a contemporaneous oral stipulation, intended to be a part of the contract, but not reduced to writing, that upon failure to sell, after making a reasonable effort, the vendee may return the goods to the vendor at the expiration of a period named. *Ibid.*

34. *Same—Omission to Read Contract.*—Evidence in conflict or at variance with the express terms of a written contract is not admissible upon the ground that the party thereto did not read the contract, when there is no suggestion that he was prevented from reading it or that he was put off his guard by any fraud, artifice, deception or other wrongful act of the other party. *Ibid.*

35. *Contracts in Writing—Parol—"Vary or Contradict"—Principal and Agent.*—It is incompetent to show that an agent of one of the parties to a written contract contemporaneously agreed with the other party, by parol, and as a part of the written contract, upon matters contradictory of and at variance with the express statement in writing that there was no such oral agreement. *Ibid.*

36. *Contracts in Writing—Principal and Agent—Waiver by Parol—Burden of Proof.*—In order to establish a waiver, by parol, of the express terms of a written contract by an agent of one of the parties, the burden of proof is on the party seeking to establish it. *Ibid.*

EVIDENCE—*Continued.*

37. *Contracts in Writing—Mortgagor and Mortgagee—Parol—Contradiction.*—When the vendee of lands has mortgaged them back to the vendor to secure the purchase price in a sum named, and it is expressly stated in the mortgage that a certain number of bales of cotton, weighing 500 pounds each, should be paid in lieu of said sum, at certain times extending over a period of ten years, the notes secured by the mortgage specifying that payment has to be made in cotton accordingly, evidence is incompetent of a parol agreement, made at the time of the execution of the mortgage, that in event of payment in full at any one time, or of foreclosure, the specified amount was to be paid in money at plaintiff's option, as such would be a contradiction by parol evidence of the terms of a written instrument. *Walker v. Venters*, 388.

38. *Nonsuit — Carriers of Goods — Contract to Deliver.*—It is error in the trial Judge to render a judgment of nonsuit upon the evidence in an action brought by a consignor against a common carrier to recover the value of a lost shipment, when there is evidence that he was under contract to deliver it to the consignee at destination. In such instances the title and possession of the shipment do not, as a matter of law, pass to the consignee by delivery to the common carrier. *Box Factory v. Railroad*, 421.

39. *Telegrams.*—When telegrams are introduced in evidence from one party to the suit to the other, telegrams from the other party, received under circumstances clearly indicating they are replies, can be introduced by the same party without further proof, when they are relevant to the inquiry. *Edwards v. Erwin*, 429.

40. *Same—Harmless Error.*—When of a series of telegrams one is admitted in evidence as received in reply to those sent by the party offering them, and it does not appear to have any connection with the others and has no bearing upon the facts at issue, it is harmless error. *Ibid.*

41. *Judgment — Nonsuit — Substantial Damages — Instructions.*—When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from a breach of contract, a motion as of nonsuit upon the evidence will not be sustained upon the theory that no substantial damages have been shown. The question as to substantial recovery must be raised by a prayer for instruction. *Ibid.*

42. *Judgments—Nonsuit—Collateral Matters.*—A motion as of nonsuit upon the evidence should not be directed to collateral

EVIDENCE—*Continued.*

matters, and thereunder the defendant cannot successfully contend that plaintiff obtained a warrant of attachment, alleging a breach of contract, and then complain and lay his proof in tort. *Ibid.*

43. *Appeal and Error—Referee's Findings of Fact.*—The Supreme Court is bound by the findings of fact of the referee, sustained by the trial Judge, when there is evidence to support them. *Foy v. Gray*, 436.

44. *Claim and Delivery—Ownership—Issues.*—An allegation and supporting evidence that certain tobacco, the subject of claim and delivery proceedings, was in a house on defendants' land at the time of the alleged sale, and by agreement was to be hauled and delivered to plaintiffs by defendants, is sufficient to raise the issue, "Did defendants afterwards agree with plaintiffs that the tobacco should remain on defendants' land as the property of the plaintiffs?" *Andrews v. Grimes*, 437.

45. *Judgment—Res Adjudicata.*—A judgment of a court of competent jurisdiction, including an adjudication of a fact controverted in a subsequent action, is perfect evidence of its own validity, and the fact so determined is *res adjudicata.* Therefore, when judgment has been rendered for damages for the loss of freight in an action against a carrier, the carrier cannot, in a subsequent suit brought to recover a statutory penalty for delay in settlement for the lost freight, introduce evidence tending to show that it had never in fact received the goods, as that issue was necessarily covered by the former judgment. *Southerland v. Railroad*, 442.

46. *Vendor and Vendee—Contracts—Breach of Warranty—"Opinion Evidence."*—In an action to recover the purchase price of a machine, the defense being a breach of warranty, it was competent for witnesses to testify as to their opinion on the question whether the machine was fitted for the work it was guaranteed to do, when the witnesses were qualified by training and experience to express an opinion that would aid the jury to a correct conclusion, and where this training and experience was acquired by the use and operation of machines of like kind and make, identical in principle, structure and operation; and though the witnesses had not had personal observation of the very machine which was the immediate subject of inquiry. *Tire Setter Co. v. Whitehurst*, 446.

47. *Carriers of Goods—Records—Corroborative Evidence.*—In an action against a carrier for damages arising from an injury to stock *en route* an "original record" of one of the freight

EVIDENCE—*Continued.*

conductors, tending to show that the stock was not so injured, is incompetent, unless corroborative of the direct testimony of the conductor who made the record. *Jones v. Railroad*, 449.

48. *Carriers of Goods—Live Stock Injured—Possession of Carriers—Presumptive Evidence—Prima facie Case—Rebuttal.*—Plaintiff's action is against the carrier to recover for injury to live stock in transit, including the killing of a horse. There was evidence tending to show the injury was received while the stock was in defendant's possession: *Held*, (1) the evidence made out a *prima facie* case against the carrier; (2) it was proper for the court to charge the jury, upon supporting evidence, that if the horse died from natural causes or was injured as an ordinary incident of handling a car of stock, the presumption of negligence would be rebutted; and this rule would apply to all the stock delivered in a damaged condition. *Ibid.*

49. *Carriers—Accepting Freight—Nonsuit.*—When it appears that the plaintiff, in an action against a carrier for failure to accept freight for shipment when tendered, did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but that they carried it back and shipped it the next day, a motion as of nonsuit upon the evidence should be allowed. *Cox v. Railroad*, 459.

50. *Superior Title.*—When both parties to an action for the possession of land claim title from a common source, one of them is not estopped to show a superior outstanding title, provided he connects himself with such title. *Warren v. Williford*, 474.

51. *Same—Tax Deed—Instruction.*—When a party to an action for possession of land introduces deeds for the purpose of showing legal title in himself, and also a tax deed held by the defendant to the land, for the purpose of impeaching it, which shows title from a common source with him, it is not error in the trial Judge to instruct the jury that the ownership of the land depends upon the validity of the tax deed. *Ibid.*

52. *Deeds and Conveyances—Tax Deeds—Validity—Presumptions—Burden of Proof.*—One relying upon a tax deed for title to lands must show that the statutory requirements necessary to the validity of the deed have been met, for there is no legal presumption in favor of the validity of the deed otherwise than the statute provides. *Ibid.*

EVIDENCE—*Continued.*

53. *Deeds and Conveyances—Title—Common Source—Rule of Convenience.*—When both parties to an action for the possession of land claim title from a common source, the plaintiff is not required to show title out of the State. *Ibid.*

54. *Contracts, Interpretation of—Sale of Goods Delivered—Pleadings—Allegation and Proof.*—An accepted offer by letter of vendor for goods to be delivered sometime in October or November, at vendee's option, at a certain price, further stated that a definite time for delivery could not be fixed, owing to the uncertainty of water transportation. In a letter of acceptance the vendée requested that shipment be made between November 1st and 10th. It was agreed that shipment should be made by vessel. Vendee sued for damages arising from delay, alleging delivery was to have been made between November 1st and 10th. The correspondence was in evidence and no amendment of complaint was requested: *Held*, (1) there was a fatal variance between the allegation and proof; (2) there was no definite time fixed in which the goods were contracted to be delivered. *Sumrell v. Salt Co.*, 552.

55. *Carriers of Passengers—Negligence—Declarations, Corroborative.*—When, in an action for damages claimed by reason of the negligence of defendant's employees while attempting to rescue a passenger on its steamboat who had fallen overboard as the boat was making her regular trip, the defendant proved by the one who was sent out for the purpose of rescue the good condition of the bateau being thus used, it was not error to admit, on behalf of plaintiff, solely as impeaching evidence, subsequent declarations of this witness tending to show that the bateau was in a leaking condition and that another man would have been helpful in bailing it. *Pate v. Steamboat Co.*, 571.

56. *Carriers of Passengers—Steamboats—Passenger Overboard—Rescue—Negligence—Questions for Jury.*—After discovering the peril of a passenger who had fallen overboard into the water from defendant's steamboat while on her trip, it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of the ship and the other passengers, to rescue him; and evidence of negligence in the performance of this duty is sufficient to be passed on by the jury which tends to show unnecessary confusion and delay, that the bateau used was leaky and unfit and not properly manned, that there were no lights, and that with

EVIDENCE—*Continued.*

reasonable alacrity and proper help the boat might have reached the spot where the passenger sank in time to have saved him. *Ibid.*

57. *Negotiable Instruments—Burden of Proof—Questions for Jury.* When it has been established or there is allegation and evidence tending to show that a negotiable instrument was procured by fraud, in a suit by one claiming to be the holder in due course, it was error for the trial Judge, upon supporting evidence, to charge the jury that the *prima facie* case of the plaintiff was restored by his uncontradicted testimony; that he acquired the note in the usual course of business, before maturity and without notice of any vice in it, as the burden of proof thereof was upon plaintiff, and the question as to the issue and the credibility of the evidence thereon was one for the jury. *Bank v. Fountain*, 590.

EXCEPTIONS. See Evidence, 10; Appeal and Error, 3; Condemnation Proceedings, 5; Procedure, 14.

EXCUSABLE NEGLECT. See Appeal and Error, 10, 11.

EXECUTORS AND ADMINISTRATORS.

1. *Foreign Executors—Bond—Deeds and Conveyances—Statutory Requirements—Interpretation of Statutes.*—Under Revisal, sec. 28, declaring that "no foreign executor has any authority to intermeddle with the estate until he shall have entered into a bond" within a year from the testator's death, deeds made by foreign executors to lands in this State, under a power in the will to sell, convey no title until the statutory requirements have been complied with. *Glascock v. Gray*, 346.

2. *Same—Words and Phrases.*—The words "intermeddle with the estate," used in Revisal, sec. 28, in relation to the authority of foreign executors in dealing with the testator's property here, signify that foreign executors may not, without giving bond, exercise any control over any part of the estate, real or personal, until the terms of the act are complied with. *Ibid.*

3. *Mortgagor and Mortgagee—Vendor and Vendee.*—Plaintiffs, in an action to enforce specific performance of a contract to convey lands, made by deceased and his wife, brought suit against the wife as administratrix of her husband, and obtained judgment that the administratrix execute and deliver a deed to him upon payment of the purchase money on a specified day, and in default the lands be sold at public auction for cash, etc., naming a commissioner; also, that the case be retained for further consideration of questions raised by

the pleadings in regard to the disposition of the purchase money. The case was inadvertently dropped from the docket by the Clerk, and at a subsequent term reinstated, on defendant's motion, the Judge finding that the administratrix failed to advertise the land as directed, but had since then made a deed to plaintiff upon payment by him of purchase money: *Held*, (1) the judgment, in effect, was to declare the holders of the legal title trustees to secure the purchase money and pay remainder to plaintiff, and by the administratrix accepting the money, the same result would follow upon equitable principles, and her deed would be valid; (2) the decree of sale of the land as made by the court was a proper one, as the relation of vendor and vendee under such conditions is, for all practical purposes, that of mortgagor and mortgagee. *Jones v. Jones*, 358.

4. *Insolvency of Executors—Removal—Waste.*—An executor will not be removed for insolvency, upon petition of those interested in the estate, if such was his condition in the lifetime of his testator and known to him, when there is no evidence of waste or misapplication of funds. *In re Knowles*, 461.

5. *Same—Bond.*—A bond will not be required of an executor because of his insolvency, unless there is evidence of his wasting the estate of his testator or misapplying the assets, or danger that a *devastavit* will be committed. *Ibid.*

6. *Same—Personalty Incident to Enjoyment of Land—Right of Use and Consumption—Remainder.*—In an action to require an executor to give bond for the alleged ground of insolvency and that a *devastavit* has been committed, the will devised and bequeathed to the wife "all my personal property, to use as long as she lives," with limitation over; also to her, during her life, "full privilege and control" of the land and real estate, with limitation over. Under citation from the Clerk, the executors filed inventory showing payment of all debts and delivery to the wife of certain moneys, household and kitchen furniture, and also certain products from the land: *Held*, (1) the use of the personal property was incident to the enjoyment of the land, and was properly delivered to the widow, to be used by her for her support in keeping with her condition and standing in life; (2) what was not consumed will at her death go to the remaindermen; (3) an order requiring the executors to file a statement of their account, with permission given petitioners to apply for a receiver, if it appeared they were wasting the estate, afforded full protection to the remaindermen. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

7. *Waste—Wills, Interpretation of.*—When it is necessary to construe the will, in an action against the executors for waste, to determine the questions involved, the court will do so to that extent and for that purpose only. *Ibid.*

8. *Judgments—Creditor's Bill—Jurisdiction.*—An action in the nature of a creditor's bill, brought in the Superior Court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judgment of a justice of the peace, and is barred if not commenced within the time limited. *Oldham v. Rieger*, 548.

9. *Revisal, Sec. 59 — Actions—Negligence—Killing—One Year—Condition Annexed—Limitations of Actions.*—Under Revisal, sec. 59, giving a cause of action on account of the wrongful killing of intestate to the (executor) administrator or collector of decedent, the provision that suit should be brought within one year after such death is a condition annexed, and must be proved by the plaintiff to make out a *prima facie* case, and is not required to be pleaded as a statute of limitation. *Gulledge v. Railroad*, 567.

10. *Same—Controversy—Collectors.*—It is no excuse for plaintiff not bringing an action under Revisal, sec. 59, within one year, etc., to show that there was a controversy over the administration. A collector should have been appointed for the purpose of suit. *Ibid.*

EXPERT EVIDENCE. See Evidence, 7.

EXPLOSIVES.

1. *Trespass—Negligence—License.*—One storing dynamite on his own premises for legitimate purposes, in boxes, with the word "Dynamite" written or printed on the box containing it, placed in a shanty with the door open and window torn out, thus affording ample opportunity to see the danger, owes no further duty to a person going upon the premises without either an express or implied license, and is not liable to him for damages caused by his companions shooting into the shanty and exploding the dynamite, not knowing it was there. *Fanning v. White*, 541.

2. *Same — Independent Acts.* — When one trespasses upon the premises of the owner of lands and shoots into a shanty in which the owner had rightfully placed dynamite, and thereby causes an explosion, which injures a third person, the act of shooting, being done by an independent, intelligent agency, was the cause of the injury, and the owner of the lands is not liable for damages. *Ibid.*

EXPRESS COMPANIES. See Carriers of Freight, 1, 2, 3.

FACTS. See Instructions, 2; Condemnation Proceedings, 4; Appeal and Error, 10.

FACTS, FINDING OF. See Appeal and Error, 18.

FAILURE TO READ. See Contracts, 23.

FALSE REPRESENTATIONS. See Corporations, 7.

FINDINGS OF FACT. See Appeal and Error, 18.

FORECLOSURE. See Mortgagor and Mortgagee, 1, 2, 3, 4.

FORM OF ACTION. See Penalty Statutes, 4.

FOREIGN EXECUTORS. See Executors and Administrators, 1, 2.

FRAUD. See Negotiable Instruments, 10.

FRAUD OR MISTAKE. See Negotiable Instruments, 10.

1. *Insurance—False Representations—Reformation of Contract.*—Courts of equity will reform a written contract of life insurance in accordance with the representations made by the agents of the insurance company, which are false and fraudulent, relied on by the insured, and reasonably induced him, an illiterate man, to accept it as the one he thereby supposed it to be. *Sykes v. Insurance Co.*, 13.

2. *Processioning — Surveyor — Consent Judgment—Compliance—Jurisdiction.*—In proceedings for the processioning of lands consent judgment was entered in the Superior Court, to which the case, on issue joined, had been transferred, that the plaintiff was the owner and entitled to the quiet possession of the land, the boundary to which was in dispute; that a surveyor be appointed to run, mark and establish the corners and lines and file a report of same with the Clerk, to be recorded as a part of the minutes in the action. The surveyor, after notice and in the presence of the parties and others, located the line and made full report to the court, including a map of the lands located: *Held*, (1) under Revisal, sec. 614, the Judge in term time had full jurisdiction to hear and determine all matters in controversy and enter the judgment as above; (2) the court subsequently had no power to modify or set the judgment aside, except for fraud or the mistake of both parties. *Rogers v. Sluder*, 43.

3. *Insurance — Contract Induced by Fraud — Subsequent Payments—Waiver.*—When it is established that an insurance company has induced the insured to take a policy of life insurance by false and fraudulent representations, causing him to believe he could get the amount paid in premiums, with interest, at the expiration of a five-year period, the

FRAUD OR MISTAKE—*Continued.*

insured, by then making demand and afterwards continuing to pay for another five-year period under like representations and conditions, does not waive his right of action. *Stroud v. Insurance Co.*, 54.

4. *Insurance—Contracts—Torts—Waiver—Justices of the Peace—Jurisdiction.*—When an insurance company has received premiums from the insured under a contract of insurance induced by false and fraudulent representations, the insured may waive the tort and sue for money had and received; and, an action therefor being *ex contractu*, the justice's jurisdiction is not limited to $50, as in action for tort. *Ibid.*

5. *Contracts—How Taken Advantage of—Collateral Attack in Action Upon—Parol Evidence.*—Parol evidence is admissible to vary the terms of a written instrument, only for fraud or mistake, and then the contract must be reformed, upon proper allegations, in an independent action, or by way of affirmative defense, properly pleaded, in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself. *Basnight v. Jobbing Co.*, 350.

6. *Lands — Partition — Judgments—Collateral Attack—Statutory Remedy—Petition in the Cause.*—When land is sold and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form, and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked, as the remedy is by petition in the cause, under Revisal, sec. 2513. *Hargrove v. Wilson*, 439.

GUARDIAN AND WARD.

Commingling of Funds—Ward Repudiating Investment.—When a guardian deposits in a bank his ward's money to his own credit, upon general account, he becomes the debtor of his ward to the full extent of the amount. If he makes loan from the general balance to his credit, taking a mortgage or security to himself as guardian, and afterwards buys the land at sale under the mortgage to protect the loan, the ward may, upon arrival at full age, refuse to accept the loan and hold the guardian and the sureties on his bond responsible for the amount so deposited. *Duffie v. Williams*, 530.

HARMLESS ERROR.

1. *Safe Appliances.*—When the testimony of a nonexpert witness is objected to on the ground that it is opinion evidence, and it appears that it was competent upon the question of showing whether a certain appliance furnished by an employer to an employee with which to do his work is approved and in general use, the error, if any, committed is harmless. *Britt v. Railroad*, 37.

HARMLESS ERROR—*Continued.*

2. *Instruction, Special—General Charge.*—There is no error when the special instructions given are correct when read in connection with the general charge. *Ibid.*

3. *Evidence—Telegrams.*—When of a series of telegrams one is admitted in evidence as received in reply to those sent by the party offering them, and it does not appear to have any connection with the others and has no bearing upon the facts at issue, it is harmless error. *Edwards v. Erwin*, 429.

HOLDER IN DUE COURSE. See Negotiable Instruments, 5, 6, 7, 9.

HOLOGRAPH WILLS. See Wills, 7.

HUSBAND AND WIFE. See Trusts and Trustees, 1; Deeds and Conveyances, 9, 10.

1. *Trespass—Pleadings—Attempted Seduction—Damages, Aggravation of.*—Under an allegation of trespass, in a suit by the husband, coupled with averments that it was with the "unlawful, malicious, lascivious," etc., intent and purpose to seduce, debauch and carnally know the plaintiff's wife, and that defendant did then attempt to seduce and carnally know her, the jury may award exemplary damages to the husband, under pertinent evidence, in aggravation of the actual damages caused by the mere act of trespass. *Brame v. Clark*, 364.

2. *Trespass—Seduction Attempted—Damages, Right of Husband to Recover—Constitutional Law.*—The statutory and constitutional enlargement of the property rights of the wife does not affect the rights of the husband, in an action of trespass upon his home, upon the wife's land, with the intent and attempt to seduce or carnally know her. *Ibid.*

3. *Lands—Permissive Occupation—Rent—Year's Support—Liens for Advances—Evidence—Instructions.*—When, without contract or agreement as to rent, deceased and his wife were occupants of land by permission of the owners, lived with them and were cultivating a crop thereon at the time of his death, having executed to the owners a crop lien not to exceed $121, and at his death his widow was allowed for her year's support the sum of $50 from the proceeds of the crop raised, and her whole allowance did not equal the full amount specified by statute, and the deceased's portion of the value of the crop is more than sufficient to pay the $121 limited in the crop lien and the $50 allowed the widow: *Held*, (1) that the widow could maintain an action for her allowance against the owners of the land in possession of the crops; (2) that the lower court should have instructed the jury, according to plaintiff's prayer, there being no evidence of any advances

HUSBAND AND WIFE—*Continued.*

made under the lien bond introduced by defendants, that nothing could be recovered thereunder; (3) that, in the absence of evidence as to the value of the rent, the jury should award nothing on that account. *Sessoms v. Tayloe*, 369.

IDEM SONANS. See Evidence, 2.

INDEPENDENT ACT. See Explosives, 2.

INDEPENDENT CONTRACTOR. See Contracts, 14, 15.

INJUNCTIONS. See Judgments, 4.

1. *Stockholders.*—When it appears that a corporation engaged in manufacturing cotton goods has taken out and carried insurance on the life of its president for its benefit, on account of the peculiar value of his services, and his relationship with the company has ceased, a stockholder may enjoin the further payment by the corporation of premiums on the policy. *Victor v. Mills*, 107.

2. *Taxation for Special Purposes—County Commissioners—Ministerial Duties.*—The courts, at the suit of a taxpayer, will not enjoin a tax levy made by a board of county commissioners in pursuance of their ministerial duty, for that they did not wisely exercise their discretion in fixing a greater rate of taxation on the $100 worth of property than was necessary for the purpose of paying the interest on a special indebtedness of the county, when practically all of the other taxpayers of the county have paid the tax in pursuance of the levy and the statutory limit has not been exceeded. *Railroad v. Commissioners*, 220.

3. *Same—Excess Levy, How Applied.*—When a tax has been levied for the special purpose of paying the interest on special-tax county bonds it must be exclusively applied to that purpose; and if, by any error in the judgment of the county commissioners, a greater property tax rate has been levied than was necessary, the commissioners have no power to apply the excess to a different use. Should they attempt to do so, an injunction will lie at the suit of a taxpayer. *Ibid.*

4. *Cause of Action Removed—Appeal Dismissed Without Prejudice.*—When it has been made to appear that the action is for injunctive relief only, and the cause has been removed, appeal will be dismissed without prejudice to the rights of plaintiff to sue for damages, if so desired. *Harrison v. Bryan*, 315.

5. *Mortgagor and Mortgagee—Assignee of Bond—Coprincipals—Debtor and Creditor — Subrogation and Contribution — Re-*

INJUNCTIONS—*Continued.*

straining Orders—Questions for Jury.—E. and W. executed their bond to S., secured by mortgage on two tracts of land held by each in severalty, which was subsequently assigned to defendant. W. conveyed his tract to plaintiff, and it was sold under foreclosure and purchased by defendant G. The plaintiff obtained a restraining order to prevent payment of the purchase price and completion of sale, on the ground that E. and W. were coprincipals, and that, as W. was insolvent, plaintiff was entitled to be subrogated to his rights, and contribution against E.: *Held*, (1) contribution can arise only after payment by one of the debtors; (2) whether W. can recover out of E. is a question for the jury; (3) the mortgagee or the assignee of the bond cannot be required to defer collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves; (4) the restraining order was properly dissolved. *Lumber Co. v. Satchwell*, 316.

INSOLVENCY. See Executors and Administrators. 4.

INSTRUCTIONS.

1. *Special—General Charge.*—There is no error when the special instructions given are correct when read in connection with the general charge. *Britt v. Railroad*, 37.

1a. *Special—Facts Involved.*—Prayers for special instructions are erroneous which ask the court to find facts or direct the findings of the jury upon the question of contributory negligence in favor of defendant, upon whom is the burden of proof. *Ibid.*

2. *Deeds and Conveyances—Boundaries—Evidence.*—When the boundary line between two lots of land lying east and west of each other is in dispute, and the owner had a plat of them made on the same day, in which the western one was numbered "one" and the eastern one numbered "two," and a subsequent conveyance was made by him of yet another lot, the deed to which was put in evidence for the purpose of establishing the southeast corner of lot numbered one, described as "lying south of the first, beginning at a yew pine, southeast corner of said survey, running west with said line 90 chains to a stake," it was error in the court to charge the jury in effect that the third lot lay south of the first and establish the corner thereof at a certain place at which there was no yew pine, it further appearing that by running the distance of 90 chains from the southeast corner of lot No. 2 it would include its southern boundary and fit in with the further calls in the deed. *Tate v. Johnson*, 267.

INSTRUCTIONS—*Continued.*

3. *Evidence—Accumulated Waters.*—In an action for damages to crops, brought against railroad companies, incident to the negligent construction of the companies' roadbed, whereby the crops of plaintiff were injured by the usual flow of water upon his own and from upper and adjoining lands, there was evidence tending to show that, prior to the building of the roadbed, plaintiff's land was drained by a number of lead ditches into which a number of smaller ditches on his land emptied; that defendants, in constructing their roadbed, crossed all these ditches, leaving openings with pipes in them for the drainage of the lead ditches, but closing the smaller ditches; that for the increase of flow of the water caused by the ditching and construction of the roadbed the pipes for carrying the water off in the lead ditches were insufficient: *Held,* (1) the trial Judge properly instructed the jury, if they believed the evidence, to award damages in full compensation for the injury arising in consequence of the stoppage of the small ditches, and that the openings for the passage of water through the lead ditches should have been sufficient to allow the water to pass through, with adequate piping, and the ditches should have been properly opened for the passage of the water; (2) that defendants had the right to cut a ditch, when necessary, from adjacent lands along their roadbed across plaintiff's land, but it was the duty of the defendants to have the leading and lateral ditches of sufficient capacity to carry off the additional quantity of water thereby caused to flow on plaintiff's land. *Davenport v. Railroad,* 287.

4. *Same.*—A prayer for instruction that a railroad company, in constructing its roadbed, had the right to accumulate the water which would naturally flow onto plaintiff's lands and convey the same by lateral ditches in and upon his lands, concluding "and for damages incident to this right no recovery can be had," is erroneous, when there is evidence tending to show that there was no sufficient drainage provided by the defendants for carrying it off. *Ibid.*

5. *Husband and Wife—Lands—Permissive Occupation—Rent—Year's Support—Liens for Advances—Evidence.*—When, without contract or agreement as to rent, deceased and his wife were occupants of land by permission of the owners, lived with them and were cultivating a crop thereon at the time of his death, having executed to the owners a crop lien not to exceed $121, and at his death his widow was allowed for her year's support the sum of $50 from the proceeds of the crop raised, and her whole allowance did not equal the

INSTRUCTIONS—*Continued.*

full amount specified by statute, and the deceased's portion of the value of the crop is more than sufficient to pay the $121 limited in the crop lien and the $50 allowed the widow: *Held*, (1) that the widow could maintain an action for her allowance against the owners of the land in possession of the crops; (2) that the lower court should have instructed the jury, according to plaintiff's prayer, there being no evidence of any advances made under the lien bond introduced by defendants, that nothing could be recovered thereunder; (3) that, in the absence of evidence as to the value of the rent, the jury should award nothing on that account. *Sessoms v. Tayloe*, 369.

6. *Judgment—Evidence—Nonsuit—Substantial Damages.*—When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from a breach of contract, a motion as of nonsuit upon the evidence will not be sustained upon the theory that no substantial damages have been shown. The question as to a substantial recovery must be raised by a prayer for instruction. *Edwards v. Erwin*, 429.

7. *Tax Deed.*—When a party to an action for possession of land introduces deeds for the purpose of showing legal title in himself, and also a tax deed held by the defendant to the land, for the purpose of impeaching it, which shows title from a common source with him, it is not error in the trial Judge to instruct the jury that the ownership of the land depends upon the validity of the tax deed. *Warren v. Williford*, 474.

INSURABLE INTERESTS. See Corporations, 5.

INSURANCE.

1. *False Representations—Reformation of Contract.*—Courts of equity will reform a written contract of life insurance in accordance with the representations made by the agents of the insurance company, which are false and fraudulent, relied on by the insured, and reasonably induced him, an illiterate man, to accept it as the one he thereby supposed it to be. *Sykes v. Insurance Co.*, 13.

2. *Same—Measure of Damages.*—When it is established by the verdict of the jury, upon competent evidence and under proper instructions from the court, that the insured was induced to accept a contract of insurance different from what he supposed it to be by false representations of the agents of the insurance company to the effect that he or the beneficiaries under the policy might withdraw the full amount of

INSURANCE—*Continued.*

premiums paid, with interest, the measure of damages is the full amount of premiums paid, with interest thereon in accordance with that established by the contract as reformed; and it was error in the court below in this instance to allow the legal rate of six per cent. instead of four per cent., as stated in the policy. *Ibid.*

3. *Contract Induced by Fraud—Subsequent Payments—Waiver.* When it is established that an insurance company has induced the insured to take a policy of life insurance by false and fraudulent representations, causing him to believe he could get the amount paid in premiums, with interest, at the expiration of a five-year period, the insured, by then making demand and afterwards continuing to pay for another five-year period under like representations and conditions, does not waive his right of action. *Stroud v. Insurance Co.*, 54.

4. *Contracts—Torts—Waiver—Justices of the Peace—Jurisdiction.*—When an insurance company has received premiums from the insured under a contract of insurance induced by false and fraudulent representations, the insured may waive the tort and sue for money had and received; and, an action therefor being *ex contractu*, the justice's jurisdiction is not limited to $50, as in action for tort. *Ibid.*

5. *Fire Insurance—Policies—Standard Form—Additional Insurance — Conditions Valid.* — The condition expressed in the statutory standard form of a fire insurance policy, that additional insurance upon the property covered by the policy without the assent of the insurer will render the policy void, is valid and enforcible. *Black v. Insurance Co.*, 169.

6. *Same—Waiver.*—The condition expressed in the statutory standard form of a fire insurance policy, that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy," etc., "unless such waiver, if any, shall be written upon or attached hereto," does not restrict the power of such officers, etc., to waive such condition, but establishes an invariable rule of evidence as to such waiver and renders parol evidence thereof inadmissible. *Ibid.*

7. *Fire Insurance — Contracts — Additional Insurance—Notice.*— Notice that the insured intended to take out additional insurance in the future is not notice of existing insurance at the time of contract. *Ibid.*

INTENT. See Deeds and Conveyances, 5, 7; Wills, 4, 5.

INTEREST. See Measure of Damages, 7.

INTEREST VESTED. See Wills, 6.

INTERPRETATION OF CONTRACTS. See Contracts, 14, 15, 33, 34.

INTERPRETATION OF DEEDS. See Deeds and Conveyances, 5.

INTERPRETATION OF DEED AS MORTGAGE. See Deeds and Conveyances, 28.

INTERPRETATION OF STATUTES.

1. *Condemnation—Statutes, Construction of.*—Section 2580, Revisal, stating the requisites of a petition in condemnation proceedings, must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. *Railroad v. Railroad*, 59.

2. *Ambiguity—Construed as a Whole.*—Statutes should be interpreted in accordance with that meaning which is clearly expressed, and, should there be doubt or ambiguity, the true legislative intent should be ascertained from the language used. *McLeod v. Commissioners*, 77.

3. *Municipal Bonds—Registration Books—Charter and Further Legislative Provisions — Constitutional Law.* — When there is a charter requirement of a municipality that registration books be kept open for twenty days preceding an election, and, under the provisions of a subsequent legislative act, bonds are issued pursuant to a further requirement that ten days' previous notice shall be given of the whereabouts of the registrar, the provision of the act is construed to supply a reasonable requirement, concerning which the charter is deficient, and the issue is valid when the provisions of the charter and the act are complied with. *Cottrell v. Lenoir*, 137.

4. *Municipal Bonds—Legislative Authority—Vote of People—Constitutional Law.*—Municipal bonds for special purposes, issued by express authority of the Legislature and approved by a majority of the qualified voters of the town, are valid. (*Wharton v. Greensboro*, 146 N. C., 356, cited and distinguished.) *Ibid.*

5. *Constitutional Law—Statutes—Duty of Courts.*—The courts of the State will not declare a legislative enactment unconstitutional unless it clearly or convincingly appears to them to be so. *Railroad v. Commissioners*, 220.

6. *Constitutional Law—Taxation—Construed as a Whole—Special Tax—Validity.*—Article V, section 1, of the State Constitution, providing an equation between the poll and property tax, and section 6 thereof, requiring that "the tax levied by the commissioners of the several counties for

INTERPRETATION OF STATUTES—*Continued.*

county purposes shall never exceed the double of the State tax, except for a special purpose and with the special approval of the Legislature"; and Article VII, section 7, thereof, prescribing the limitations upon the counties, etc., to contract debts for other than necessary expenses, should be construed in relation to each other, and thereunder a special tax voted by the people of a county, specially authorized by the Legislature, is not unconstitutional by reason of an increase thereby of the property tax over the constitutional equation between the general property and the poll tax. *Ibid.*

7. *Statutes in Violation of Contracts—Parties—Constitutional Questions, by Whom Raised.*—When a taxpayer has not shown that any rights of his in relation to a bond issue by a county have been affected, he cannot avail himself of the contention that a subsequent statute, repealing the statute under the provisions of which the issue was made, violated the obligations of a contract. *Railroad v. Commissioners*, 220.

8. *Taxation—No Direction of Levy of Poll Tax—No Repealing Statute.*—The only difference between the facts found in this case and those in the case immediately preceding being that the statute in this case does not in express terms direct that a poll tax be levied, and that there is no repealing act directing the levy of a poll tax or the levying of such tax beyond the sum of $2: *Held*, the digest in that case is fully applicable to this one on all points. *Railroad v. Commissioners*, 248.

9. *Executors and Administrators — Foreign Executors — Bond — Deeds and Conveyances—Statutory Requirements.*—Under Revisal, sec. 28, declaring that "no foreign executor has any authority to intermeddle with the estate until he shall have entered into a bond" within a year from the testator's death, deeds made by foreign executors to lands in this State, under a power in the will to sell, convey no title until the statutory requirements have been complied with. *Glascock v. Gray*, 346.

10. *Condition Precedent—Compliance.*—The provision in Revisal, sec. 2634, that the consignee must thereunder recover the full amount of his claim as a condition precedent to his recovering the penalty, is to establish the justness of his claim and the wrongful refusal of the carrier to pay it, and when this is otherwise established by agreement and settlement the meaning and intent of the statute have been met. *Albritton v. Railroad*, 487.

INTERPRETATION OF WILLS. See Wills, 4, 5, 6, 8, 9, 10.

INTESTACY. See Wills, 2.

INTESTACY, PARTIAL. See Wills, 8.

INVITATION. See Trespass, 5.

ISSUES.

1. *Negligence — Evidence — Proximate Cause.*—In an action for damages alleged to have arisen from the joint negligence of two defendant railroad companies, caused by a collision at a crossing of their tracks, where either one or the other may or may not be held liable under the doctrine of proximate cause, the court should submit appropriate issues directed to the several phases of the pleadings, and for greater certainty may in his discretion submit other pertinent questions to the jury as allowed by the statute. *Martin v. Railroad*, 259.

2. *Issues of Fact—Procedure.*—If it appears, in an action for *mandamus* heard at chambers to compel a County Treasurer to pay over certain moneys on hand, in accordance with a statutory requirement, that issues of fact are involved or that the case has been improperly brought before the Judge there, it should be transferred so as to be tried during term and not dismissed. *Coleman v. Coleman*, 299.

3. *Claim and Delivery — Ownership — Evidence.* — An allegation and supporting evidence that certain tobacco, the subject of claim and delivery proceedings, was in a house on defendant's land at the time of the alleged sale, and by agreement was to be hauled and delivered to plaintiffs by defendants, is sufficient to raise the issue, "Did defendants afterwards agree with plaintiffs that the tobacco should remain on defendants' land as the property of the plaintiffs?" *Andrews v. Grimes*, 437.

4. *Sufficiency.*—If issues are sufficiently definite to afford each party to the action opportunity to introduce all pertinent evidence and apply it fairly, they are as a rule unobjectionable. *Dortch v. Railroad*, 575.

JOINDER OF ACTION. See Carriers of Freight, 6; Wills, 9.

JUDGMENTS.

1. *Quo Warranto—Pleadings—Demurrer.*—When the Judge in the lower court renders judgment upon the pleadings restoring the relator in *quo warranto* to his office, the proceedings are in the nature of judgment upon demurrer, in which the allegations must be taken as true. *Burke v. Jenkins*, 25.

2. *Processioning — Surveyor — Consent — Compliance — Jurisdiction—Fraud or Mistake.*—In proceedings for the procession-

JUDGMENTS—*Continued.*

ing of lands consent judgment was entered in the Superior Court, to which the case, on issue joined, had been transferred, that the plaintiff was the owner and entitled to the quiet possession of the land, the boundary to which was in dispute; that a surveyor be appointed to run, mark and establish the corners and lines and file a report of same with the Clerk, to be recorded as a part of the minutes in the action. The surveyor, after notice and in the presence of the parties and others, located the line and made full report to the court, including a map of the lands located: *Held*, (1) under Revisal, sec. 614, the Judge in term time had full jurisdiction to hear and determine all matters in controversy and enter the judgment as above; (2) the court subsequently had no power to modify or set the judgment aside, except for fraud or the mistake of both parties. *Rogers v. Sluder*, 43.

3. *Quo Warranto—Officer Inducted—Tender of Bond—Judgment Revoked—Procedure.*—When an officer is in office by virtue of a judgment in *quo warranto* proceedings, and it is contended that he has not tendered a proper bond, he cannot be ousted, except when, upon application to the court, the judgment of induction is revoked for his failure to do so. *Burke v. Commissioners*, 46.

4. *Deeds and Conveyances — Descriptive Words — Husband and Wife—Trusts and Trustees—Construction—Estoppel—Injunction.*—In an action to remove a trustee created under the husband's deed of trust for the benefit of the wife and children it was established by the verdict of the jury, upon the issues submitted, that certain lands of the wife embraced in the boundaries of the said deed were not by the use of the language "including," etc., "(which is still retained)," included in the conveyance. Judgment was rendered reciting the issues and verdict thereon, using the same descriptive words of the land as used in the trust deed. The present action is by the child to enjoin the sale, under a subsequent mortgage, of the wife's land thus excluded in the former judgment from the operation of the trust deed: *Held*, that, construing the former judgment as an entirety, (1) it was not intended by the court to divest the wife of her title to the land by reason of the use in the judgment of the description contained in the trust deed; (2) the use of the descriptive language by the court, under the circumstances, adopting the description contained in the trust deed, evidenced his opinion that the wife's land was excluded; (3) the plaintiff in this action is estopped by the former judgment to

JUDGMENTS—*Continued.*

claim any interest in the land mortgaged by the wife; (4) a restraining order upon these facts should be dismissed. *Featherston v. Merrimon*, 199.

5. *Pleadings—Relief Demanded—Relief Granted.*—Parties to an action are not confined to the specific relief demanded in their prayers therefor, under our Code practice, and the court will give any judgment justified by the pleadings and proof.—*Bradburn v. Roberts*, 214.

6. *Nonsuit—Appeal Dismissed—Action Within One Year.*—Where there has been a judgment of nonsuit entered against a plaintiff upon the evidence, and an appeal taken to the Supreme Court which was not duly prosecuted and was dismissed under Rule 17, the judgment in the first action is not a bar to the second one, and the plaintiff may bring another action for the same cause within one year after the appeal in the first action has been dismissed. This is clearly so, if an additional cause of action is stated and no proof taken. *Lumber Co. v. Harrison*; 333.

7. *Appeal and Error—Costs of Superior Court—Final Judgment.* With but a few exceptions, as, for instance, where continuances are granted upon agreements, or judgment, that a party pay costs, the costs of the Superior Court follow final judgment. *Smith v. Railroad*, 334.

8. *Same — Successful Appeal — Costs, an Offset to Final Judgment—Transcript and Certificate.*—When plaintiff recovers final judgment in the Superior Court after two successful appeals by defendant, the costs of all the trials in the Superior Court should be taxed against the defendant, but it is entitled to offset against the final recovery all the costs properly paid by it on its successful appeals, including the transcript and certificates. *Ibid.*

9. *Title — Jurisdiction — Removal of Causes.* — The effect of a verdict and judgment in an action for the delivery of a deed held in escrow, determining that the conditions thereof have been complied with, will be to transfer, not simply the deed, but the actual title to the land. If the deed should be destroyed, the judgment could be made to operate as a deed, or the court could decree the execution of another. Hence it was not error in the court below to order that the cause be removed to the county wherein the land is situated. (*Pasterfield v. Sawyer*, 132 N. C., 258, *s. c.*, 133 N. C., 44, cited and distinguished.) *Bridgers v. Ormond*, 375.

10. *Appeal and Error—Assignment of Error of Record—Appeal.*—When the appeal calls in question only the correctness of

JUDGMENTS—*Continued.*

the judgment no summary of exceptions under Rule 19 (2) is required by Rule 21, because it is error on the face of the record. Otherwise a demurrer is sustained or overruled, for Revisal, sec. 475, provides that the demurrer shall distinctly specify the grounds of objection to the complaint. *Ullery v. Guthrie*, 417.

11. *Lands — Partition — Judgments—Collateral Attack—Fraud or Mistake—Statutory Remedy.*—When land is sold and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form, and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked, as the remedy is by petition in the cause, under Revisal, sec. 2513. *Hargrove v. Wilson*, 439.

12. *Res Adjudicata—Evidence.*—A judgment of a court of competent jurisdiction, including an adjudication of a fact controverted in a subsequent action, is perfect evidence of its own validity, and the fact so determined is *res adjudicata.* Therefore, when judgment has been rendered for damages for the loss of freight in an action against a carrier, the carrier cannot, in a subsequent suit brought to recover a statutory penalty for delay in settlement for the lost freight, introduce evidence tending to show that it had never in fact received the goods, as that issue was necessarily covered by the former judgment. *Southerland v. Railroad*, 442.

13. *Counterclaim.*—When in reply to an answer alleging a counterclaim the plaitiff denies liability thereon on the ground that an installment of the counterclaim became due after the commencement of the action, judgment on the counterclaim may be properly rendered if it arose out of the same transaction. *Slaughter v. Machine Co.*, 471.

14. *Justice's Jurisdiction—Judgment Docketed in Superior Court, Suit on.*—A judgment obtained before a justice of the peace and docketed in the Superior Court (Revisal, sec. 1479) becomes a judgment of the latter court only for the purposes of creating a lien and having execution issued thereon. Therefore an action can be brought on a justice's judgment, thus docketed, only in a justice's court, and must be commenced within the period limited on judgments of that court. *Oldham v. Rieger*, 548.

15. *Same—Executors and Administrators.*—An action in the nature of a creditor's bill, brought in the Superior Court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judgment of a justice of the peace, and is barred if not commenced within the time limited. *Ibid.*

JUDGMENTS, SUIT ON. See Jurisdiction, 6.

JURISDICTION.

1. *Processioning — Surveyor — Consent Judgment—Compliance—Fraud or Mistake.*—In proceedings for the processioning of lands consent judgment was entered in the Superior Court, to which the case, on issue joined, had been transferred, that the plaintiff was the owner and entitled to the quiet possession of the land, the boundary to which was in dispute; that a surveyor be appointed to run, mark and establish the corners and lines and file a report of same with the Clerk, to be recorded as a part of the minutes in the action. The surveyor, after notice and in the presence of the parties and others, located the line and made full report to the court, including a map of the lands located: *Held*, (1) under Revisal, sec. 614, the Judge in term time had full jurisdiction to hear and determine all matters in controversy and enter the judgment as above; (2) the court subsequently had no power to modify or set the judgment aside, except for fraud or the mistake of both parties. *Rogers v. Sluder*, 43.

2. *Insurance—Contracts—Torts—Waiver—Justices of the Peace.* When an insurance company has received premiums from the insured under a contract of insurance induced by false and fraudulent representations, the insured may waive the tort and sue for money had and received; and, an action therefor being *ex contractu*, the justice's jurisdiction is not limited to $50, as in action for tort. *Stroud v. Insurance Co.*, 54.

3. *County Treasurer—Mandamus to Compel Statutory Duty—No "Money Demand"—"Chambers."*—An action of *mandamus* to compel a County Treasurer to pay over to certain commissioners moneys he has on hand, in accordance with the requirement of a statute, is not a money demand and is properly brought before the Judge at chambers. *Coleman v. Coleman*, 299.

4. *Same—Issues of Fact—Procedure.*—If it appears, in an action for *mandamus* heard at chambers to compel a County Treasurer to pay over certain moneys on hand, in accordance with a statutory requirment, that issues of fact are involved or that the case has been improperly brought before the Judge there, it should be transferred so as to be tried during term and not dismissed. *Ibid.*

5. *Judgment—Title—Removal of Causes.*—The effect of a verdict and judgment in an action for the delivery of a deed held in escrow, determining that the conditions thereof have been complied with, will be to transfer, not simply the deed,

JURISDICTION—*Continued.*

but the actual title to the land. If the deed should be destroyed, the judgment could be made to operate as a deed, or the court could decree the execution of another. Hence it was not error in the court below to order that the cause be removed to the county wherein the land is situated. (*Pasterfield v. Sawyer*, 132 N. C., 258; *s. c.*, 133 N. C., 44, cited and distinguished.) *Bridgers v. Ormond*, 375.

6. *Judgments—Justice's Jurisdiction—Judgment Docketed in Superior Court, Suit on.*—A judgment obtained before a justice of the peace and docketed in the Superior Court (Revisal, sec. 1479) becomes a judgment of the latter court only for the purposes of creating a lien and having execution issued thereon. Therefore an action can be brought on a justice's judgment, thus docketed, only in a justice's court, and must be commenced within the period limited on judgments of that court. *Oldham v. Rieger*, 548.

7. *Same—Executors and Administrators.*—An action in the nature of a creditor's bill, brought in the Superior Court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judgment of a justice of the peace, and is barred if not commenced within the time limited. *Ibid.*

JUSTICE OF THE PEACE. See Jurisdiction, 2, 6, 7.

KNOWLEDGE. See Principal and Agent, 1.

LACHES. See Appeal and Error, 18; Stockholders, 1, 2; Trusts and Trustees, 4.

LANDLORD AND TENANT.

Husband and Wife — Lands — Permissive Occupation — Rent — Year's Support — Liens for Advances — Evidence — Instructions.—When, without contract or agreement as to rent, deceased and his wife were occupants of land by permission of the owners, lived with them and were cultivating a crop thereon at the time of his death, having executed to the owners a crop lien not to exceed $121, and at his death his widow was allowed for her year's support the sum of $50 from the proceeds of the crop raised, and her whole allowance did not equal the full amount specified by statute, and the deceased's portion of the value of the crop is more than sufficient to pay the $121 limited in the crop lien and the $50 allowed the widow: *Held*, (1) that the widow could maintain an action for her allowance against the owners of the land in possession of the crops; (2) that the lower court

LANDLORD AND TENANT—*Continued.*

should have instructed the jury, according to plaintiff's prayer, there being no evidence of any advances made under the lien bond introduced by defendants, that nothing could be recovered thereunder; (3) that, in the absence of evidence as to the value of the rent, the jury should award nothing on that account. *Sessoms v. Tayloe*, 369.

LEGACIES. See Wills, 1, 2.

LEGAL EXCUSE. See Appeal and Error, 11.

LEGISLATIVE PROVISIONS. See Bond Issues, 10.

LEVY. See Taxation, 7, 11, 13.

LIEN. See Bond Issues, 7.

LIEN, AGRICULTURAL. See Vendor and Vendee, 1.

LIENS FOR ADVANCES. See Landlord and Tenant, 1.

LIMITATION OF ACTIONS.

1. *Revisal, Sec. 59—Actions—Negligence—Killing—One Year—Condition Annexed.*—Under Revisal, sec. 59, giving a cause of action on account of the wrongful killing of intestate to the (executor) administrator or collector of decedent, the provision that suit should be brought within one year after such death is a condition annexed, and must be proved by the plaintiff to make out a *prima facie* case, and is not required to be pleaded as a statute of limitation. *Gulledge v. Railroad*, 567.
2. *Same—Controversy—Executors and Administrators—Collectors.*—It is no excuse for plaintiff not bringing an action under Revisal, sec. 59, within one year, etc., to show that there was a controversy over the administration. A collector should have been appointed for the purpose of suit. *Ibid.*

LIVE STOCK. See Evidence, 49; Carriers of Freight, 16, 17, 18.

LOOK AND LISTEN. See Railroads, 1, 2, 3.

MANDAMUS.

1. *Title to Office—Procedure.*—Title to office cannot be determined by *mandamus*. *Burke v. Commissioners*, 46.
2. *Town Commissioners—Bond, Acceptance and Approval—Ministerial Duties.*—A *mandamus* will only lie against the town commissioners to compel the consideration of a bond offered by the town treasurer, and not to compel them to accept and approve it, the commissioners being individually liable in taking one which they knew or should have known was insufficient. *Ibid.*

MANDAMUS—*Continued.*

3. *Quo Warranto—Officer Inducted—Tender of Bond—Judgment Revoked—Procedure.*—When an officer is in office by virtue of a judgment in *quo warranto* proceedings, and it is contended that he has not tendered a proper bond, he cannot be ousted, except when, upon application to the court, the judgment of induction is revoked for his failure to do so. *Ibid.*

4. *Taxation—Constitutional Limitations—Equation Between Property and Poll Tax—Validity—Practice.*—*Mandamus* to compel the commissioners of a county to collect a sufficient poll tax, under Article V, section 1, of the Constitution of North Carolina, is the proper remedy in an action by a taxpayer contending that a tax levied does not observe the constitutional equation between the poll and the property tax. *Railroad v. Commissioners*, 220.

5. *County Treasurer—Mandamus to Compel Statutory Duty—No "Money Demand"—Jurisdiction—"Chambers."*—An action of *mandamus* to compel a County Treasurer to pay over to certain commissioners moneys he has on hand, in accordance with the requirement of a statute, is not a money demand and is properly brought before the Judge at chambers. *Coleman v. Coleman*, 299.

6. *Same—Issues of Fact—Procedure.*—If it appears, in an action for *mandamus* heard at chambers to compel a County Treasurer to pay over certain moneys on hand, in accordance with a statutory requirement, that issues of fact are involved or that the case has been improperly brought before the Judge there, it should be transferred so as to be tried during term, and not dismissed. *Ibid.*

7. *County Treasurer — Funds — Rightful Custodian.*—A County Treasurer required by statute to pay accounts against the road fund under certain machinery provided for the purpose cannot be compelled by *mandamus* to turn over the funds to a road commission, as by the language of the statute he is the rightful custodian. *Ibid.*

MASTER AND SERVANT.

1. *Railroads—Employer and Employee—Dangerous Spur Tracks—Moving Cars—Contributory Negligence—Proximate Cause.*—Contributory negligence on the part of deceased employee in not fastening the brakes to a car before endeavoring to couple it to the engine on a down grade spur track, and jumping upon the car in order to save it when it was in rapid motion, is not the proximate cause of his death, when it appears that the death resulted from a derailment, owing to the fact, unknown to deceased, that the rails were out of alignment. *Dortch v. Railroad*, 575.

MASTER AND SERVANT—*Continued.*

2. *Same—Questions for Jury.*—While, ordinarily, jumping on or off a moving car is such contributory negligence as will bar a recovery for injuries received, it is for the jury to say whether a man of ordinary prudence would under similar circumstances have done so, when it appears that the car on which plaintiff was engaged in the course of his employment was derailed, owing to the unsafe condition of the spur track, unknown to him, and he jumped from it when he suddenly found himself in a dangerous position as it was leaving the track, though subsequent developments may show that he otherwise would not have been injured. *Ibid.*

MEASURE OF DAMAGES.

1. *Telegraph—Death Message, Delay in Delivery of—Decomposition.*—In an action upon a message announcing a death, when the complaining party arrived in time to see the body, damages will not be awarded for injury to feelings caused by seeing the corpse in an advanced stage of decomposition as a natural consequence of a breach of duty by the telegraph company in not delivering the message more promptly. *Woods v. Telegraph Co.*, 1.

2. *Insurance—Contract Reformed.*—When it is established by the verdict of the jury, upon competent evidence and under proper instructions from the court, that the insured was induced to accept a contract of insurance different from what he supposed it to be by false representations of the agents of the insurance company, to the effect that he or the beneficiaries under the policy might withdraw the full amount of premiums paid, with interest, the measure of damages is the full amount of premiums paid, with interest thereon in accordance with that established by the contract as reformed; and it was error in the court below in this instance to allow the legal rate of six per cent. instead of four per cent., as stated in the policy. *Sykes v. Insurance Co.*, 13.

3. *Carriers of Freight—Express—Special Circumstances—Implied Notice.*—When goods are shipped for a special purpose or for present use it is not always necessary that those facts should be mentioned in the negotiations, or in express terms made a part of the contract; for, when they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages in a suit against the carrier for wrongful delay, when they naturally and proximately follow from the breach of duty. *Furniture Co. v. Express Co.*, 87.

MEASURE OF DAMAGES—*Continued.*

4. *Same—Questions for Jury.*—The plaintiff caused to be shipped to its own address by express an engine shaft weighing not less than 650 pounds, from Erie, Pa., to Lenoir, N. C. The plaintiff's name indicated its business as that of manufacturing furniture. Upon the measure of damages in a suit against the express company for wrongful delay: *Held*, (1) that the express company was fixed with implied notice of the facts and circumstances under which special damages necessarily arose to plaintiff from the stopping of its factory on account of the delay; (*a*) the unusual shipment by express indicated urgency; (*b*) the name of the consignee indicated the purpose for which the shipment was needed; (*c*) the shaft indicated that it was necessary to the working of the engine to run the machinery, and (*d*) the size of the shaft was evidence of the power of the engine required to work the machinery; (2) the measure of damages was the interest on capital invested and unproductive for the time, and, when applicable, the pay of idle and necessarily unemployed hands, with such other expenses reasonably referable to defendant's wrong, including an outlay of plaintiff in a reasonable effort to minimize the loss; (3) the question upon the facts presented was one for the jury. *Ibid.*

5. *Same—Value of Shares—Questions for Jury.*—W., M. and C. owned all the shares of stock in a manufacturing corporation, of which W. had the general management. After some bargaining between W. on the one hand and M. and C. on the other, the latter agreed for a certain price to buy the stock of the former, and gave their note for it. Upon this note suit was brought by W. and M., and C. set up by way of counterclaim a demand for damages for breach of warranty. There was evidence that W. furnished or caused to be furnished to M. and C. a statement, corroborated by the books, that the indebtedness of the company was in a certain sum, but in fact it was much greater, and could not have been known or ascertained by M. and C. until after the close of the transaction. There was no evidence of fraudulent intent on the part of W.: *Held*, (1) that it is not necessary that a warranty be made in express terms, and that an affirmation of a material fact intended and relied upon as an inducement to the trade may be sufficient; (2) there was evidence sufficient to go to the jury upon the question of express warranty; (3) the measure of damages was not the difference between the represented and actual indebtedness, but only as it affected the value of the stock bought. *Wrenn v. Morgan*, 101.

MEASURE OF DAMAGES—*Continued.*

6. *Contracts—Conditions Precedent, Breach of—Negotiable Instruments—Payment of Note.*—A holder of a negotiable instrument who has violated his agreement with the maker by negotiating it without performing a condition precedent to its validity is liable to the maker in such sum as he may have lawfully been compelled to pay thereon to an innocent purchaser for value without notice. *Hughes v. Crooker*, 318.

7. *Contracts—Crop Payments—Mortgagor and Mortgagee—Interest.*—When, under the express terms of a written contract, the purchase price for certain lands was to have been paid in cotton in certain amounts and at various times, in lieu of an amount specified in the mortgage, upon default, the amount due on the mortgage is the value of the cotton at the market price when each installment fell due, with interest, subject to payments and set-offs, if any. *Walker v. Venters*, 388.

8. *Mortgagor and Mortgagee—Sale of Mortgaged Property—Purchaser—Surrender in Law—Questions for Jury.*—Defendant represented to plaintiff that he had a mortgage on a certain horse plaintiff had bought, whereupon plaintiff replied that if the horse was defendant's property he could go and get him. This the defendant afterwards did in plaintiff's absence. Subsequently plaintiff ascertained that defendant's mortgage had not been registered at the time of his purchase, and brought claim and delivery proceedings. Defendant replevied and then sold the horse: *Held*, (1) that defendant's taking the horse under the circumstances was not a surrender in law by the plaintiff; (2) that the question of laches as to defendant's registering the mortgage has no application, as he should have retained the possesion until the mortgage was registered; (3) that the amount of recovery should be the value of the horse at the time it was wrongfully taken, with interest therefrom, and the amount paid for the horse by plaintiff was only to be considered by the jury upon the question of such value. *Taylor v. Mills*, 415.

9. *Carriers of Goods—Consignor and Consignee—Contract to Deliver—Suit by Consignor.*—A vendor who is under contract to deliver goods to a vendee is entitled to recover the identical goods or, if they are lost, their value and interest from a common carrier in default, to whom they had been delivered for shipment. *Box Factory v. Railroad*, 421.

10. *Contracts, Breach of—Matters in Diminution—Pleadings—Burden of Proof.*—When it is established that defendant contracted with plaintiff for the latter to furnish special goods to be manufactured, and the defendant has wrongfully re-

MEASURE OF DAMAGES—*Continued.*

fused to take them, the damages sustained by the plaintiff is the difference between what it would have cost the plaintiff to carry out its part of the contract and the contract price, in the absence of averment and proof by defendant of any fact in diminution of the damages, the burden being on defendant. *Springs Co. v. Buggy Co.*, 533.

MERGER. See Carriers of Freight, 5.

MESSAGES, DELIVERY OF. See Telegraph Companies, 1, 2, 3.

MESSAGES, SERVICE. See Telegraph Companies, 4.

MINISTERIAL DUTIES. See Cities and Towns, 4; County Commissioners, 1.

MODELS. See Evidence, 5.

MONEY DEMAND. See Mandamus, 5.

MORTGAGOR AND MORTGAGEE.

1. *Deeds and Conveyances — Trusts and Trustees — Foreclosure Proceedings—Failure to Redeem—Equitable Remedies.*—Under a consent decree it was admitted that the vendee held the land in controversy in trust to pay an obligation to him of the vendor in a specified sum, and adjudged that the vendor have the amount of the rents and profits credited thereon, ascertained by a reference to be in a certain sum. The court thereupon adjudged that the land be sold by a commissioner, authorizing him to make title, and who, in pursuance thereof, made title to the said vendee: *Held*, (1) that the vendor was estopped from contending for a recovery as to new credits set up for waste, except such as were not conclusively settled by the judgment; (2) that by the consent decree the action virtually became one to foreclose a mortgage; (3) that there was no error in the order of the trial Judge that the land be sold and the equities administered upon the failure of the vendor to redeem within the time specified in the decree. *Bradburn v. Roberts*, 214.

2. *Power of Sale—Foreclosure—Title Conveyed.*—The grantee of a mortgagor under the power of sale by foreclosure contained in the mortgage, in the absence of collusion or fraud, takes title pursuant to the execution of the power. *Dunn v. Oettinger*, 276.

3. *Same—Trusts and Trustees—Termination of Trust Estate.*—H. sold lands to D., who gave him a mortgage thereon to secure balance of the purchase price. Thereafter he mortgaged the same land to O., who subsequently brought suit to foreclose. In the meanwhile H. foreclosed under the power of sale con-

MORTGAGOR AND MORTGAGEE—*Continued.*

tained in his mortgage and made deed to B., and after the satisfaction of his debt, paid the balance to O. without objection from D., whereupon judgment was rendered against D. for the amount yet due O. after deducting this credit. Thereafter O., by agreement between himself and B., bought an interest in the land from B. In the absence of any fraud or collusion between B., the purchaser at the mortgage sale, and O., the holder of the second mortgage: *Held*, (1) all the right, title and interest of the mortgagor and the second mortgagee in the land was extinguished by the sale under the first mortgage; (2) the general principle of law forbidding the mortgagee to acquire title in the trust estate against the mortgagor during the continuance of the trust has no application. *Ibid.*

4. *Same—Laches, Evidence of.*—When a mortgagor seeks to set aside a sale made in pursuance of a power given under a mortgage, upon the ground that the mortgagee bought in the trust estate during the continuance of the trust, and the record shows that he had had opportunities to set up the equity thus claimed in various other suits, it is at least suggestive of laches and inconsistent with his present action, though possibly not an estoppel of record. *Ibid.*

5. *Assignee of Bond—Coprincipals—Debtor and Creditor—Subrogation and Contribution—Restraining Orders—Questions for Jury.*—E. and W. executed their bond to S., secured by mortgage on two tracts of land held by each in severalty, which was subsequently assigned to defendant. W. conveyed his tract to plaintiff, and it was sold under foreclosure and purcased by defendant G. The plaintiff obtained a restraining order to prevent payment of the purchase price and completion of sale, on the ground that E. and W. were coprincipals, and that, as W. was insolvent, plaintiff was entitled to be subrogated to his rights, and contribution against E.: *Held*, (1) contribution can arise only after payment by one of the debtors; (2) whether W. can recover out of E. is a question for the jury; (3) the mortgagee or the assignee of the bond cannot be required to defer collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves; (4) the restraining order was properly dissolved. *Lumber Co. v. Satchwell*, 316.

6. *Contracts in Writing—Parol Evidence—Contradiction.*—When the vendee of lands has mortgaged them back to the vendor to secure the purchase price in a sum named, and it is expressly stated in the mortgage that a certain number of bales of cotton, weighing 500 pounds each, should be paid in lieu

MORTGAGOR AND MORTGAGEE—*Continued.*

of said sum, at certain times extending over a period of ten years, the notes secured by the mortgage specifying that payment has to be made in cotton accordingly, evidence is incompetent of a parol agreement, made at the time of the execution of the mortgage, that in event of payment in full at any one time, or of foreclosure, the specified amount was to be paid in money at plaintiff's option, as such would be a contradiction by parol evidence of the terms of a written instrument. *Walker v. Venters*, 388.

7. *Contracts—Crop Payments—Measure of Damages—Interest.*—When, under the express terms of a written contract, the purchase price for certain lands was to have been paid in cotton in certain amounts and at various times, in lieu of an amount specified in the mortgage, upon default, the amount due on the mortgage is the value of the cotton at the market price when each installment fell due, with interest, subject to payments and set-offs, if any. *Ibid.*

8. *Sale of Mortgaged Property—Purchaser—Surrender in Law—Measures of Damages—Questions for Jury.*—Defendant represented to plaintiff that he had a mortgage on a certain horse plaintiff had bought, whereupon plaintiff replied that if the horse was defendant's property he could go and get him. This the defendant afterwards did in plaintiff's absence. Subsequently plaintiff ascertained that defendant's mortgage had not been registered at the time of his purchase, and brought claim and delivery proceedings. Defendant replevied and then sold the horse: *Held*, (1) that defendant's taking the horse under the circumstances was not a surrender in law by the plaintiff; (2) that the question of laches as to defendant's registering the mortgage has no application, as he should have retained the possession until the mortgage was registered; (3) that the amount of recovery should be the value of the horse at the time it was wrongfully taken, with interest therefrom, and the amount paid for the horse by plaintiff was only to be considered by the jury upon the question of such value. *Taylor v. Mills*, 415.

9. *Deeds and Conveyances—Equity of Redemption, Agreement to Surrender—Void Conditions.*—Immediately after the *habendum* clause in a paper-writing, called by the parties a deed, it was stated that the writing was to be null and void upon the maker's paying a sum certain, with interest, at a specified time, and on the margin thereof a provision that, if the grantee pay a certain sum at the time specified, the "deed" was to be null and void. No power of sale was contained in the deed. *Held*, (1) the deed is a mortgage upon its face;

MORTGAGOR AND MORTGAGEE—*Continued.*

(2) an agreement made by the mortgagor at the time of the execution of a mortgage to surrender the equity of redemption for a consideration then fixed to be paid at maturity is invalid. *Wilson v. Fisher*, 535.

10. *Same—Mortgagee in Possession—Permanent Improvements—Reference.*—When the mortgagee has been in peaceful possession of the mortgaged premises for a long time, claiming them as his own by reason of payment of a certain fixed sum for the equity of redemption provided for by the terms of the instrument, it is within the equity jurisdiction of the court, in an action to redeem, to permit him to offset against the rents and profits the increased value of the lands, owing to permanent improvements he has put on them, and a reference is proper to state an account between the parties. *Ibid.*

MOTION IN THE CAUSE. See Supplemental Proceedings, 1, 9.

MOTION TO DISMISS. See Appeal and Error, 18.

MUNICIPAL BOND. See Bond issues, 10.

MUNICIPAL CORPORATIONS.

1. *School Districts — Constitutional Law.* — A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of Article VII, section 7, of the State Constitution. *Hollowell v. Borden*, 255.

2. *Same—Debts Contracted—Public Schools—Special Purpose—Vote of the People.*—The expense of a public-school system of a town is not a necessary municipal expense, and a bond issue to pay a debt contracted for that purpose, to be constitutional, must be submitted to a vote of the qualified voters of the township. Laws 1905, ch. 533, sec. 14. (*Collie v. Commissioners*, 145 N. C., 170, cited and distinguished.) *Ibid.*

MUNICIPAL TAXATION. See Taxation, 1, 2.

NECESSARIES. See Bond Issues, 3, 4, 5, 6, 7; Constitutional Law, 6, 7, 17.

NEGLECT, EXCUSABLE. See Appeal and Error, 10, 11.

NEGLIGENCE.

1. *Telegraph — Messages, Delay in Delivery of — Prima Facie Case—Burden of Proof.*—When the failure of a telegraph company to deliver a message is shown, a *prima facie* case of liability is made out, and the burden of proof is upon the company to show facts excusing its failure. *Woods v. Telegraph Co.*, 1.

NEGLIGENCE—*Continued.*

2. *Same—Duty of Company—Evidence—Nonsuit.*—Upon plaintiff's evidence, tending to show that a telegram was addressed to No. 38 D. Street, where it could not have been delivered, and when the addressee lived in the rear of No. 83 D. Street, where delivery could have been made, and defendant introduced no evidence, it was error in the trial Judge to sustain a motion as of nonsuit upon the evidence, as it then was incumbent upon the defendant to show such reasonable inquiry and the exercise of that degree of care required of it under the circumstances to excuse the failure to deliver. *Ibid.*

3. *Telegraph — Message—Wrong Address—Delivery—Reasonable Efforts—Evidence—Idem Sonans.*—When a telegram was addressed to the wrong street number, where it could not have been delivered, it was incumbent upon the defendant to use such reasonable efforts to deliver it as required when no number is given; and the city directory containing the name of addressee, of Jay Wood for Jay Woods, with his correct address, it is sufficient evidence of negligence for the jury to consider. *Ibid.*

4. *Same—"Service" Message—"Better Address."*—When the addressee of a message cannot, after due search, be found at the terminal point, a failure of the telegraph company to wire the sending office for a better address is some evidence of its negligence. *Ibid.*

5. *Evidence—Nonsuit.*—In an action for damages occasioned by an injury received by reason of a motorcycle frightening a horse so that it then ran over plaintiff, a motion as of nonsuit upon the evidence should be allowed, when it appears from unconflicting testimony that the horse gave no indication of fright until he was nearly up to the defendant; that the defendant stopped the noise of the machine as soon as he saw the horse, a distance of about 150 yards, and that the machine was standing still when the horse ran over plaintiff and injured him. *Long v. Warlick*, 32.

6. *Railroads—Trespassers—Concurrent—"Look and Listen."*—It is the duty of a trespasser upon a railroad track both to look and listen for approaching trains, and when by looking the injury complained of would have been avoided, his negligence in this respect is concurrent, and damages are not recoverable by him incurred on that account. *Beach v. Railroad*, 153.

7. *Same.*—An engineer on a moving train has the right to expect that a trespasser on the track has exercised due care in looking as well as listening for approaching trains; and, though

NEGLIGENCE—*Continued.*

there may have been observed by him an engine standing near the place of the injury, which was evidently making noises to interfere with hearing the approach of his train, the duty of the trespasser to look is not diminished, but increased. *Ibid.*

8. *Same—Nonsuit.*—When it is shown by the evidence that plaintiff's intestates were trespassers on defendant's railroad track, walking in front of an approaching train in the direction the train was moving; that it was a bright day and the track of defendant was straight at that place; that there was no obstruction to prevent their seeing the train for a distance of from one-half to three-fourths of a mile, or the engineer from seeing them; that the engineer, on approaching, seeing they did not leave the track, sounded the danger signal and applied the brakes in a fruitless effort to avoid killing them; that the engineer saw an engine standing near the place of the accident, and before it occurred, evidently making noises to prevent their hearing the approaching train, a motion as of nonsuit upon the evidence was properly sustained. *Ibid.*

9. *Railroads—Modern Equipment—Injury from Another Cause.*—When the damages complained of were not caused by failure of a railroad to equip its trains with automatic couplers or the latest and most approved devices, the principles of law enunciated in those instances are not applicable. *Dermid v. Railroad*, 180.

10. *Railroads—Evidence—Coupling Cars.*—Evidence of negligence is not sufficient which merely shows that, in obedience to a signal from the conductor, the engineer took up the slack in his train of freight cars and thereby injured the conductor, who immediately after signalling, went between the cars unexpectedly for the purpose of coupling them. *Ibid.*

11. *Railroads—Evidence—Modern Equipment—"Bumpers"—Questions for Court.*—When a recovery against a railroad company is sought upon the ground that its train was furnished and equipped with automatic couplers, but that the bumpers had not been removed therefrom; that plaintiff's intestate was injured while coupling the cars as the engine was taking up slack, the mere fact that the bumpers were permitted to remain on the cars raises no question of negligence for the jury, when it appears from the other testimony that the bumpers were then in general use on cars of that character. *Ibid.*

12. *Defenses—Proximate Cause—Single Liability.*—When each of the complaints in two separate suits against two distinct corporations alleges a joint cause of action upon the question of

NEGLIGENCE—*Continued.*

negligence as to both, it is no valid objection, under our Code practice, to an order consolidating them that either the one or the other defendant may be found solely liable on the trial, owing to some act or omission to act being the proximate cause of the injury. *Martin v. Railroad*, 259.

13. *Same—Issues.*—In an action for damages alleged to have arisen from the joint negligence of two defendant railroad companies, caused by a collision at a crossing of their tracks, where either one or the other may or may not be held liable under the doctrine of proximate cause, the court should submit appropriate issues directed to the several phases of the pleadings, and for greater certainty may in his discretion submit other pertinent questions to the jury as allowed by the statute. *Ibid.*

14. *Telegraph Companies — Proximate Cause — Notice of Importance of Message.*—In an action against a telegraph company for its wrongful failure to deliver a message to the wife of the sender informing her that he was in a railroad wreck, but not hurt, it was shown that in fact the sender was hurt in the wreck; that he informed the company's agent at the time the message was sent that he knew his wife would hear of the wreck and spend a miserable night; that the message was not delivered until the next morning, and the wife passed a night of mental anguish, having heard of the wreck of the train on which she expected her husband and not having been able to hear with certainty as to his condition, though she heard that he was hurt: *Held*, (1) the notice given to the agent at the time the message was filed for transmission was sufficient for a recovery of damages against the company for the mental anguish sustained that night by the wife; (2) that the negligence of the company was the proximate cause of the injury. *Suttle v. Telegraph Co.*, 480.

15. *Trespass—License—Explosives.*—One storing dynamite on his own premises for legitimate purposes, in boxes, with the word "Dynamite" written or printed on the box containing it, placed in a shanty with the door open and window torn out, thus affording ample opportunity to see the danger, owes no further duty to a person going upon the premises without either an express or implied license, and is not liable to him for damages caused by his companions shooting into the shanty and exploding the dynamite, not knowing it was there. *Fanning v. White*, 541.

16. *Same — Independent Acts.* — When one trespasses upon the premises of the owner of lands and shoots into a shanty in which the owner had rightfully placed dynamite, and thereby

NEGLIGENCE—*Continued.*

causes an explosion, which injures a third person, the act of shooting, being done by an independent, intelligent agency, was the cause of the injury, and the owner of the lands is not liable for damages. *Ibid.*

17. *Revisal, Sec. 59—Actions—Killing—One Year—Condition Annexed—Limitations of Actions—Prima Facie Case.*—Under Revisal, sec. 59, giving a cause of action on account of the wrongful killing of intestate to the (executor) administrator or collector of decedent, the provision that suit should be brought within one year after such death is a condition annexed, and must be proved by the plaintiff to make out a *prima facie* case, and is not required to be pleaded as a statute of limitation. *Gulledge v. Railroad*, 567.

18. *Carriers of Passengers—Declarations, Corroborative.*—When, in an action for damges claimed by reason of the negligence of defendant's employees while attempting to rescue a passenger on its steamboat who had fallen overboard as the boat was making her regular trip, the defendant proved by the one who was sent out for the purpose of rescue the good condition of the bateau being thus used, it was not error to admit, on behalf of plaintiffs, solely as impeaching evidence, subsequent declarations of this witness tending to show that the bateau was in a leaking condition and that another man would have been helpful in bailing it. *Pate v. Steamboat Co.*, 571.

19. *Carriers of Passengers—Steamboats—Passenger Overboard—Rescue—Evidence—Questions for Jury.*—After discovering the peril of a passenger who had fallen overboard into the water from defendant's steamboat while on her trip, it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of the ship and the other passengers, to rescue him; and evidence of negligence in the performance of this duty is sufficient to be passed on by the jury which tends to show unnecessary confusion and delay, that the bateau used was leaky and unfit and not properly manned, that there were no lights, and that with reasonable alacrity and proper help the boat might have reached the spot where the passenger sank in time to have saved him. *Ibid.*

20. *Railroads—Dangerous Spur Tracks.*—It is the duty of a railroad company to keep its sidings and spur tracks in a reasonably safe condition for the traffic done over them; and when in the discharge of his duties an employee is killed by

NEGLIGENCE—*Continued.*

reason of a derailment of the car on which he was engaged, caused by the rails being out of alignment, a *prima facie* case of negligence is established. *Dortch v. Railroad*, 575.

NEGOTIABLE INSTRUMENTS.

1. *Mortgagor and Mortgagee—Assignee of Bond—Coprincipals—Debtor and Creditor — Subrogation and Contribution — Restraining Orders—Questions for Jury.*—E. and W. executed their bond to S., secured by mortgage on two tracts of land held by each in severalty, which was subsequently assigned to defendant. W. conveyed his tract to plaintiff, and it was sold under foreclosure and purchased by defendant G. The plaintiff obtained a restraining order to prevent payment of the purchase price and completion of sale, on the ground that E. and W. were coprincipals, and that, as W. was insolvent, plaintiff was entitled to be subrogated to his rights, and contribution against E.: *Held*, (1) contribution can arise only after payment by one of the debtors; (2) whether W. can recover out of E. is a question for the jury; (3) the mortgagee or the assignee of the bond cannot be required to defer collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves; (4) the restraining order was properly dissolved. *Lumber Co. v. Satchwell*, 316.

2. *Contracts — Conditions Precedent, Breach of — Payment of Note—Measure of Damages.*—A holder of a negotiable instrument who has violated his agreement with the maker by negotiating it without performing a condition precedent to its validity is liable to the maker in such sum as he may have lawfully been compelled to pay thereon to an innocent purchaser for value without notice. *Hughes v. Crooker*, 318.

3. *Endorser—Dishonor—Notice—Discharge.*—A person, not otherwise a party, placing his name in blank on the back of a negotiable note before delivery, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, is liable as an endorser, and discharged therefrom upon failure of notice of nonpayment and dishonor at maturity. (Revisal, secs. 2212, 2213, 2219, 2239; *Rouse v. Wooten*, 140 N. C., 558, cited and distinguished.) *Perry v. Taylor*, 362.

4. *Rights of Holder in Due Course — Strangers — Notice.* — By discounting a draft with bill of lading attached, and assigned as security, the holder has an interest in the goods, the subject of the bill of lading, only to the extent sufficient to protect his claim; and when the consignee accepts and pays

NEGOTIABLE INSTRUMENTS—*Continued.*

the draft and receives the goods from the carrier on presentation of the bill of lading, without being permitted by the carrier to examine them, he does so in recognition of the holder's rights, and the holder is not liable upon a breach of warranty of contract between the original parties, to which he was a stranger, in the absence of evidence that he had notice thereof. *Mason v. Cotton Company*, 492.

5. *Drafts, Acceptance of—Rights of Holder in Due Course—Contracts—Consignor and Consignee.*—After a draft for the purchase price of goods, with bill of lading attached, has been accepted by the drawee, the amount previously paid therefor by a holder in due course becomes a new and binding consideration, giving such holder a position superior to the original contract rights between the consignor and consignee, and to any defenses existent between them. *Ibid.*

6. *Stare Decisis—Rule of Property—Uniformity of Decisions—Commercial Law.*—While the doctrine of *stare decisis* is one of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents, and the courts will adhere to a decision, found to be erroneous, when it has been acquiesced in for so great a length of time as to become accepted law, constituting a rule of property, it should not be extended and applied to a decision which is clearly erroneous and which injuriously affects a general business law. *Ibid.*

7. *Same—Decision Overruled—Retrospective Effect.*—A decision of a court of supreme jurisdiction overruling a former decision is, as a rule, retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was law; and this principle should apply to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods. *Ibid.*

8. *Consignor and Consignee—Draft, Bill of Lading Attached—Holder in Due Course—Original Contract, Liability of Holder on.*—One who has discounted a draft in due course, made for the purchase price of goods, with bill of lading attached, and assigned to him as security to the draft, is not liable on that account for a breach of warranty in a contract between the consignor and consignee respecting the quality of the goods, the subject of the bill of lading. *Ibid.*

9. *Holder in Due Course—Fraud—Notice—Burden of Proof.*—When it is shown that a negotiable instrument sued on has been procured by fraud, or there is evidence tending to establish it, it is necessary for a recovery by one claiming to

NEGOTIABLE INSTRUMENTS—*Continued.*

be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it. (Revisal, secs. 2201, 2208.) *Bank v. Fountain*, 590.

10. *Instruments—Evidence—Burden of Proof—Questions for Jury.* When it has been established or there is allegation and evidence tending to show that a negotiable instrument was procured by fraud, in a suit by one claiming to be the holder in due course, it was error for the trial Judge, upon supporting evidence, to charge the jury that the *prima facie* case of the plaintiff was restored by his uncontradicted testimony; that he acquired the note in the usual course of business, before maturity and without notice of any vice in it, as the burden of proof thereof was upon plaintiff, and the question as to the issue and the credibility of the evidence thereon was one for the jury. *Ibid.*

NONSUIT. See Evidence, 1.

1. *Negligence—Evidence.*—In an action for damages occasioned by an injury received by reason of a motorcycle frightening a horse so that it then ran over plaintiff, a motion as of nonsuit upon the evidence should be allowed, when it appears from unconflicting testimony that the horse gave no indication of fright until he was nearly up to the defendant; that the defendant stopped the noise of the machine as soon as he saw the horse, a distance of about 150 yards, and that the machine was standing still when the horse ran over plaintiff and injured him. *Long v. Warlick*, 32.

2. *Condemnation — Defendant's Rights—Procedure.*—In proceedings by one railroad company to condemn a right of way upon which another was lawfully constructing its roadbed the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after having obtained an order, in the progress of the case, giving it exclusive possession and ejecting the defendant from the *locus in quo*. *Railroad v. Railroad*, 59.

3. *Railroads — Trespassers — Negligence—Evidence.*—When it is shown by the evidence that plaintiff's intestates were trespassers on defendant's railroad track, walking in front of an approaching train in the direction the train was moving; that it was a bright day and the track of defendant was straight at that place; that there was no obstruction to prevent their seeing the train for a distance of from one-half to three-fourths of a mile, or the engineer from seeing them;

NONSUIT—*Continued.*

that the engineer, on approaching, seeing they did not leave the track, sounded the danger signal and applied the brakes in a fruitless effort to avoid killing them; that the engineer saw an engine standing near the place of the accident, and before it occurred, evidently making noises to prevent their hearing the approaching train, a motion as of nonsuit upon the evidence was properly sustained. *Beach v. Railroad*, 153.

4. *Railroads—Contributory Negligence—Coupling Cars.*—When as a necessary consequence in coupling together freight cars onto a train the engine must back upon them to take up slack, it is contributory negligence on the part of the conductor to signal the engine for this purpose and then go at once between the cars to couple together the air-brake hose beneath them, when from his experience he knew of the danger of doing so; and upon such evidence by plaintiff a motion of nonsuit should be granted. *Dermid v. Railroad*, 180.

5. *Cities and Towns—Streets—Dedication—Revocation—Description—Evidence.*—C. was the owner of two certain town lots abutting on A. Street, numbers 37 and 38, from whom plaintiff claims under *mesne* conveyances. A. Street had been laid off and designated on a map of the town, but had never been used for street purposes. C., prior to conveying the lots, obtained a quitclaim deed from the town to A. Street under legislative authority, which subsequently came by *mesne* conveyances to defendants. In making the deed to the two lots under which plaintiff claims, the following calls were given: to "a stake, the old S. West corner of lot 37, on the edge of old A. Street; thence with the line of lot 37," etc.: *Held*, (1) that the deed of A. Street to C. from the town was valid and effective, and, though there was evidence of a prior dedication of that street, the deed from the town amounted to a revocation by mutual consent; (2) that the calls in the deed under which plaintiff claims were meant for description only; (3) that the motion for judgment as of nonsuit upon the evidence should have been granted. (*Southport v. Stanly*, 125 N. C., 464, cited and distinguished.) *Church v. Dula*, 262.

6. *Judgment — Appeal Dismissed — Action Within One Year.* — Where there has been a judgment of nonsuit entered against a plaintiff upon the evidence, and an appeal taken to the Supreme Court which was not duly prosecuted and was dismissed under Rule 17, the judgment in the first action is not a bar to the second one, and the plaintiff may bring another action for the same cause within one year after the appeal

NONSUIT—*Continued.*

in the first action has been dismissed. This is clearly so, if an additional cause of action is stated and no proof taken. *Lumber Co. v. Harrison*, 333.

7. *Evidence—Carriers of Goods—Contract to Deliver.*—It is error in the trial Judge to render a judgment of nonsuit upon the evidence in an action brought by a consignor against a common carrier to recover the value of a lost shipment, when there is evidence that he was under contract to deliver it to the consignor at destination. In such instances the title and possession of the shipment do not, as a matter of law, pass to the consignee by delivery to the common carrier. *Box Factory v. Railroad*, 421.

8. *Judgment—Evidence—Substantial Damages—Instructions.*—When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from a breach of contract, a motion as of nonsuit upon the evidence will not be sustained upon the theory that no substantial damages have been shown. The question as to a substantial recovery must be raised by a prayer for instruction. *Edwards v. Erwin*, 429.

9. *Judgments—Evidence—Collateral Matters.*—A motion as of nonsuit upon the evidence should not be directed to collateral matters, and thereunder the defendant cannot successfully contend that plaintiff obtained a warrant of attachment, alleging a breach of contract, and then complained and laid his proof in tort. *Ibid.*

10. *Carriers—Accepting Freight—Evidence.*—When it appears that the plaintiff, in an action against a carrier for failure to accept freight for shipment when tendered, did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but that they carried it back and shipped it the next day, a motion as of nonsuit upon the evidence should be allowed. *Cox. v. Railroad*, 459.

11. *Procedure—Exceptions.*—It is the more orderly course of procedure for the plaintiff, whose prayer for special instruction has been refused, to note exception, instead of taking a nonsuit. *Wilson v. Fisher*, 535.

NOTICE. See Insurance, 7; Partnerships, 1, 2, 3; Negotiable Instruments, 3, 8, 9.

NOTICE, IMPLIED. See Measure of Damages, 3, 4.

NOTICE OF CLAIM. See Carriers of Freight, 18.

NOTICE OF IMPORTANCE. See Telegraph Companies, 14.

NOTICE TO CONSIGNEE. See Carriers of Freight, 8, 9.

NOTICE TO OWNERS. See Condemnation Proceedings, 1.

OCCUPATION, PERMISSIVE. See Landlord and Tenant, 1.

OFFICE HOURS. See Telegraph Companies, 10.

OFFICERS. See Corporations, 2; Principal and Surety, 2.

OPINION EVIDENCE. See Evidence, 8, 21, 47.

OWNERSHIP. See Trespass, 1; Claim and Delivery, 1.

PAROL EVIDENCE. See Contracts, 11; Evidence, 33, 34, 35, 36, 37, 38.

PARTIES. See Deeds and Conveyances, 8.

Railroads—Rights of Way—Ejectment—Permanent Damages—Pleadings—Ouster.—In an action for damages against a railroad company for unlawfully entering upon lands of plaintiffs and wrongfully occupying them for a right of way, it appears that one of the plaintiffs had, previously to the commencement of the action, conveyed the land to his coplaintiffs, who reconveyed it to him thereafter; further, that the company had entered on, constructed and was operating its railroad on the *locus in quo*. The plaintiffs, who were the owners of the land at the time of the commencement of the action, filed no complaint: *Held*, (1) damages for the entire wrong—past, present and prospective—should be had in one action, and on payment thereof by the company an easement passed to it, as in proceedings in ejectment; (2) it was necessary to retain all the parties to the action in order to protect the defendant from other and further recoveries for the same cause, though the court would not compel those of the plaintiffs who had not done so to file complaints; (3) the company could not be ousted by an action of ejectment. *Porter v. Railroad*, 563.

PARTITION.

Lands—Judgments—Collateral Attack—Fraud or Mistake—Statutory Remedy.—When land is sold and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form, and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked, as the remedy is by petition in the cause, under Revisal, sec. 2513. *Hargrove v. Wilson*, 439.

PARTNERSHIP.

1. *Retirement of Partner—Notice.*—In order for an ostensible or known partner retiring from a firm to escape future liability as a member thereof to a creditor who advances credit to the

PARTNERSHIP—*Continued.*

partnership, actual notice of the retirement must be given, or the existence of such facts must be brought home to the creditor as would put a person of reasonable business prudence on such inquiry as would lead to knowledge of the dissolution or the retirement of the partner. *Straus v. Sparrow*, 309.

2. *Same—Questions for Jury.*—Upon the question of notice to a creditor of a partnership, residing at a distance, of the retirement from the firm of one of the partners, whereon depends the liability of the retiring partner for a debt subsequently contracted with the creditor by the partnership, publication of notice in a local paper is not as a rule recognized as sufficient; but when it is further shown in evidence that notice was thus published for sixty days, and that a copy containing the publication was sent to the creditor, these additional facts, while not conclusive, would present a case for the consideration of the jury on the question of notice. *Ibid.*

3. *Retirement of Partner—Notice—Principal and Agent—Knowledge of Agent.*—Knowledge of the agent of facts relating to matters within the scope of his agency is knowledge of the principle; and when a sales and collection agent has been informed of the retirement of a partner from the firm, and thereafter at any time advances credit to the partnership, the retired partner is relieved of liability therefor. (*Cowan v. Roberts*, 133 N. C., 629, cited and distinguished.) *Ibid.*

4. *Same—Dissolution.*—In an action by one partner for dissolution of the partnership, on the grounds that he had been denied participation in the profits, and his partner was mismanaging the firm's affairs and converting its assets to his own use, the answer of the other partner alleged the pendency of a prior action against the firm, brought by a creditor of the firm, in which, by answer, he in effect demanded an accounting and dissolution and division of the surplus. All the parties to the former action agreed to a reference, including the taking and stating of an account between the defendants therein, with leave to file and amend pleadings, etc. In the present suit the Judge in the lower court passed upon the answer and evidence in the former suit, and found them to be as stated: *Held*, (1) the plea of former suit by answer in this action was a proper plea; (2) the plaintiff in this action can obtain the same relief in the former action, and have the necessary ancillary remedies which may be required to protect his interests pending the litigation, by proper application to the court: (3) it was error in the lower court to overrule the defendant's motion to dismiss in this action. *Emery v. Chappell*, 327.

PARTY AGGRIEVED. See Carriers of Freight, 4.

PASSENGER OVERBOARD. See Steamboat.

PAVEMENTS. See Bond Issues, 4, 6.

PAYMENTS. See Negotiable Instruments, 2; Insurance, 3.

PENALTY STATUTES.

1. *Carriers of Goods—Benefit of Shipper—Party Aggrieved.*—When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under Revisal, sec. 2632, and the proper party plaintiff. Revisal, sec. 400. *Robertson v. Railroad*, 323.

2. *Carriers of Goods—Suit for Damages and Penalty—Joinder of Action—Contract—Merger.*—An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay given by Revisal, sec. 2632, do not merge into each other. They arise on contract and may be joined in the same action. Revisal, sec. 2634. *Ibid.*

3. *Carriers of Goods—Defense—Burden of Proof—Evidence.*—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by Revisal, sec. 2632, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." *Ibid.*

4. *Carriers of Goods—Action for Penalty, Form of.*—Under Revisal, sec. 2632, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, that would be a mere informality, which could be remedied by amendment. *Ibid.*

5. *Interpretation — Strict Construction.* — Penalty statutes are strictly construed, and to recover thereunder the plaintiff must bring his case clearly within the language and meaning of the law. *Cox v. Railroad*, 459.

6. *Same — Carriers — Accepting Freight — Evidence — Nonsuit.*—When it appears that the plaintiff, in an action against a carrier for failure to accept freight for shipment when tendered, did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but that they carried it back and shipped it the next day, a motion as of nonsuit upon the evidence should be allowed. *Ibid.*

PENALTY STATUTES—*Continued.*

7. *Constitutional Law — Commerce Clause.* — Sections 2634 and 2644 of the Revisal, imposing certain penalties against common carriers, are not unconstitutional as in violation of the Fourteenth Amendment to the Federal Constitution, or the Commerce Clause (Art. I, sec. 8) of said Constitution, and the acts passed in pursuance thereof. *Iron Works v. Railroad*, 469.

8. *Damages—Separable Causes.*—Actions against a carrier for damages arising from goods damaged or lost while in its possession, and for the penalty for delay of carrier in settlement within sixty days after claim has been filed, etc. (Revisal, sec. 2634), are separable causes. *Albritton v. Railroad*, 485.

9. *Failure to Pay Claim — Accepting Payment for Damages — Waiver—Suit for Penalty.*—The consignee, by accepting from the carrier the full amount claimed as damages to or loss of goods while in its possession, does not waive his right of action to recover the penalty for failure of the carrier to adjust and pay the amount within the time limited after claim has been filed, etc., under Revisal, sec. 2634. *Ibid.*

10. *Same — Condition Precedent — Compliance — Interpretation of Statutes.*—The provision in Revisal, sec. 2634, that the consignee must thereunder recover the full amount of his claim as a condition precedent to his recovering the penalty, is to establish the justness of his claim and the wrongful refusal of the carrier to pay it, and when this is otherwise established by agreement and settlement the meaning and intent of the statute have been met. *Ibid.*

PERFORMANCE, ASSUMED. See Contracts, 2.

PERMANENT DAMAGES. See Damages, 14.

PERMANENT IMPROVEMENTS. See Mortgagor and Mortgagee, 10.

PERMISSIVE OCCUPATION. See Landlord and Tenant, 1.

PERSONALTY. See Executors and Administrators, 6.

PETITION. See Supplemental Proceedings, 2; Condemnation Proceedings, 10.

PETITION IN THE CAUSE. See Fraud or Mistake, 6.

PLEA IN ABATEMENT. See Abatement.

PLEADINGS.

1. *Quo Warranto—Judgment—Demurrer.*—When the Judge in the lower court renders judgment upon the pleadings restor-

PLEADINGS—*Continued.*

ing the relator in *quo warranto* to his office, the proceedings are in the nature of judgment upon demurrer, in which the allegations must be taken as true. *Burke v. Jenkins*, 25.

2. *Demurrer—Contracts Assumed for Performance.*—A demurrer to a complaint, in an action for damages for breach of contract, for that it does not allege a contract or agreement between the parties to the suit, though not frivolous, will not be sustained when it is alleged that the defendant had taken over the contract made by others with the plaintiff and had expressly agreed with him to fully perform it, and failed to comply with such agreement. *Younce v. Lumber Co.*, 34.

3. *Contracts — Counterclaim — Express Warranty.*—When, in an action to enforce collection of a note given for the purchase price of property, a defense is made by the way of counterclaim based upon the ground of false representations, and not to set the transaction aside for mistake, it is required, to sustain the counterclaim, that defendant should establish that the trade was induced by false and fraudulent representations, reasonably relied on by defendant, or that there was a breach of a warranty given in the contract of sale. *Wrenn v. Morgan*, 101.

4. *Same—Measure of Damages—Value of Shares—Questions for Jury.*—W., M. and C. owned all the shares of stock in a manufacturing corporation, of which W. had the general management. After some bargaining between W. on the one hand and M. and C. on the other, the latter agreed for a certain price to buy the stock of the former, and gave their note for it. Upon this note suit was brought by W. and M., and C. set up by way of counterclaim a demand for damages for breach of warranty. There was evidence that W. furnished or caused to be furnished to M. and C. a statement, corroborated by the books, that the indebtedness of the company was in a certain sum, but in fact it was much greater, and could not have been known or ascertained by M. and C. until after the close of the transaction. There was no evidence of fraudulent intent on the part of W.: *Held*, (1) that it is not necessary that a warranty be made in express terms, and that an affirmation of a material fact intended and relied upon as an inducement to the trade may be sufficient; (2) there was evidence sufficient to go to the jury upon the question of express warranty; (3) the measure of damages was not the difference between the represented and actual indebtedness, but only as it affected the value of the stock bought. *Ibid.*

5. *Act of Corporation Alleged—Directors.*—When it is alleged in the complaint and admitted in the answer that the wrong

PLEADINGS—*Continued.*

complained of was caused by the act of the corporation, no question is presented of an excess of power exercised by the board of directors. *Victor v. Mills*, 107.

6. *Relief Demanded—Relief Granted.*—Parties to an action are not confined to the specific relief demanded in their prayers therefor, under our Code practice, and the court will give any judgment justified by the pleadings and proof. *Bradburn v. Roberts*, 214.

7. *Joint Cause Alleged—Consolidation.*—It was not error in the lower court to consolidate two suits brought by the plaintiff against two distinct railway companies, when the injury complained of is alleged in the complaint to have arisen from the failure of each defendant to adopt, promulgate and enforce together a reasonably safe system and rules regulating the approach of their engines and cars at a crossing of their tracks for the protection of their passengers thereat, thus rendering the condition of the passengers extra hazardous. *Martin v. Railroad*, 259.

8. *Same—Negligence—Defenses—Proximate Cause—Single Liability.*—When each of the complaints in two separate suits against two distinct corporations alleges a joint cause of action upon the question of negligence as to both, it is no valid objection, under our Code practice, to an order consolidating them, that either the one or the other defendant may be found solely liable on the trial, owing to some act or omission to act being the proximate cause of the injury. *Ibid.*

9. *Same—Issues.*—In an action for damages alleged to have arisen from the joint negligence of two defendant railroad companies, caused by a collision at a crossing of their tracks, where either one or the other may or may not be held liable under the doctrine of proximate cause, the court should submit appropriate issues directed to the several phases of the pleadings, and for greater certainty may in his discretion submit other pertinent questions to the jury as allowed by the statute. *Ibid.*

10. *Appeal and Error—Amendment—Discretion.*—The refusal of a motion to be allowed to amend pleadings is in the discretion of the trial Judge and not reviewable on appeal. *Coleman v. Coleman*, 299.

11. *Contracts—Fraud or Mistake, How Taken Advantage of—Collateral Attack in Action Upon.*—Parol evidence is admissible to vary the terms of a written instrument, only for fraud or mistake, and then the contract must be reformed, upon proper allegations, in an independent action, or by way of

PLEADINGS—*Continued.*

affirmative defense, properly pleaded, in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself. *Basnight v. Jobbing Co.*, 350.

12. *Trespass—Presumptions—Damages—Allegations Sufficient.*—From every action of trespass the law infers some damages, and an allegation that defendant did unlawfully, forcibly, etc., enter upon certain lands in plaintiff's possession and occupation is sufficient to sustain the action. *Brame v. Clark*, 364.

13. *Trespass—Husband and Wife—Attempted Seduction—Damages, Aggravation of.*—Under an allegation of trespass, in a suit by the husband, coupled with averments that it was with the "unlawful, malicious, lascivious," etc., intent to seduce, debauch and carnally know the plaintiff's wife, and that defendant did then attempt to seduce and carnally know her, the jury may award exemplary damages to the husband, under pertinent evidence, in aggravation of the actual damages caused by the mere act of trespass. *Ibid.*

14. *Demurrer—Cause Defectively Stated—Amendments.*—A demurrer will not be sustained to a complaint merely because a cause of action is defectively stated, which may easily be remedied by amendment, if necessary. *Poythress v. Railroad*, 391.

15. *Trespassers—Personal Injury—Children—Invitation, Expressed or Implied—Demurrer.*—Owners in possession of lands are not liable to trespassers for injuries received from conditions arising from the lawful use thereof for manufacturing or other lawful purposes; and a complaint alleging that the electrical plant on defendant's premises was alluring or attractive to boys, and the plaintiff, a boy of thirteen years of age, was injured while going through an opening between two buildings on defendant's lands by falling into a well of hot water negligently covered over, used in the conduct of defendant's business, and there is no allegation that boys usually passed the place where the injury was occasioned or were in the habit of frequenting the defendant's premises on account of its attractiveness, or that invitation, expressed or implied, had been extended by defendant, the plaintiff was a trespasser, and defendant is not responsible for his act thereof, and a demurrer will be sustained. *Briscoe v. Lighting and Power Co.*, 396.

16. *Slight Variations Disregarded—Amendments in Superior and Supreme Courts.*—Very slight variations between the allegation and the proof should be disregarded; and, when the variation is serious, amendment may be permitted by the

PLEADINGS—*Continued.*

trial Judge to make the allegations conform to the proof (Revisal, sec. 507), and also by the Supreme Court. (Revisal, sec. 1545.) *Andrews v. Grimes*, 439.

17. *Demurrer — Principal and Agent — Sales Agent Furnished — Damages.*—When it is alleged that defendant was to furnish plaintiff an experienced and successful sales agent for goods sold to it, and damages are claimed on account of the agent furnished having run away with plaintiff's horse and buggy and embezzled its funds, but it is not alleged that defendant knew that the character of the agent was bad, a demurrer to the complaint should be sustained. The agent furnished by the defendant became the plaintiff's agent alone when it employed him. *Slaughter v. Machine Co.*, 471.

18. *Demurrer—Contracts—Counterclaim, When Available.*—In an action for damages claimed by reason of embezzlement by a sales agent furnished to plaintiff by defendant, it is admissible, under Revisal, sec. 481, for defendant to set up a counterclaim for the price of the machines it was alleged that the agent was furnished to sell, though the price for a part of the machines became due after the commencement of the action; for the counterclaim is a cause of action connected with the subject-matter of the action, and one arising on contract and existing at the commencement of the action on the contract. *Ibid.*

19. *Same—Judgment on Counterclaim.*—When in reply to an answer alleging a counterclaim the plaintiff denies liability thereon on the ground that an installment of the counterclaim became due after the commencement of the action, judgment on the counterclaim may be properly rendered if it arose out of the same transaction. *Ibid.*

20. *Water and Water Courses—Drainage of Lands—Petition—Description—Amendments.*—A petition in proceedings brought for the purpose of readjusting the rights and duties of adjoining landowners in draining their lands into a certain canal is not uncertain because it does not restate the *termini* of the canal which sufficiently appear in the original proceedings; and, if otherwise, the petitioner should be allowed to amend. *Staton v. Staton*, 490.

21. *Contracts, Breach of—Measure of Damages—Matters in Diminution—Burden of Proof.*—When it is established that defendant contracted with plaintiff for the latter to furnish special goods to be manufactured, and the defendant has wrongfully refused to take them, the damages sustained by the plaintiff is the difference between what it would have cost the plaintiff to carry out its part of the contract and the contract

PLEADINGS—*Continued.*

price, in the absence of averment and proof by defendant of any fact in diminution of the damages, the burden being on defendant. *Springs Co. v. Buggy Co.*, 533.

22. *Contracts, Interpretation of—Sale of Goods Delivered—Allegation and Proof—Evidence.*—An accepted offer by letter of vendor for goods to be delivered sometime in October or November, at vendee's option, at a certain price, further stated that a definite time for delivery could not be fixed, owing to the uncertainty of water transportation. In a letter of acceptance the vendee requested that shipment be made between November 1st and 10th. It was agreed that shipment should be made by vessel. Vendee sued for damages arising from delay, alleging delivery was to have been made between November 1st and 10th. The correspondence was in evidence and no amendment of complaint was requested: *Held*, (1) there was a fatal variance between the allegation and proof; (2) there was no definite time fixed in which the goods were contracted to be delivered. *Sumrell v. Salt Co.*, 552.

23. *Contracts—Sale of Goods Delivered—Indefinite as to Time of Delivery—Allegation and Proof.*—When it is stated by vendor, in the course of the correspondence establishing a contract for the sale of goods at a price delivered by vessel, that vessels were scarce, but he would be on the outlook and ship at the earliest possible moment, and nothing appears to indicate that the contract of sale was made upon a different basis, in an action for damages alleged to have accrued on account of delay, it was necessary for vendee to allege and prove, to sustain his action, that the first available vessel was not used by vendor for the shipment. *Ibid.*

24. *Railroads—Rights of Way—Ejectment—Parties—Permanent Damages.*—In an action for damages against a railroad company for unlawfully entering upon lands of plaintiffs and wrongfully occupying them for a right of way, it appears that one of the plaintiffs had, previously to the commencement of the action, conveyed the land to his coplaintiffs, who reconveyed it to him thereafter; further, that the company had entered on, constructed and was operating its railroad on the *locus in quo*. The plaintiffs, who were the owners of the land at the time of the commencement of the action, filed no complaint: *Held*, (1) damages for the entire wrong—past, present and prospective—should be had in one action, and on payment thereof by the company an easement passed to it, as in proceedings in ejectment; (2) it was necessary to retain all the parties to the action in order to protect the

PLEADINGS—*Continued.*

defendant from other and further recoveries for the same cause, though the court would not compel those of the plaintiffs who had not done so to file complaints; (3) the company could not be ousted by an action of ejectment. *Porter v. Railroad*, 563.

POLICIES. See Insurance, 5, 6.

POLL TAX. See Taxation, 14, 15; Constitutional Law, 10, 13, 15, 20, 21.

POSSESSION. See Mortgagor and Mortgagee, 10; Procedure, 11; Carriers of Freight, 16.

POWER OF COURT.

1. *Constitutional Law—Statutes—Duty of Courts.*—The courts of the State will not declare a legislative enactment unconstitutional unless it clearly or convincingly appears to them to be so. *Railroad v. Commissioners*, 220.

2. *Plea in Abatement—Action Dismissed—Discretionary Powers of Trial Judge.*—When in an action there is a plea of a former action, wherein the full relief demanded can be had, it is in the discretion of the trial Judge to stay further proceedings in the present action until an opportunity is given to correct the record in the former suit, so as to embrace further matters set out in the present suit, or he may dismiss, and require plaintiff to start anew after having the record in the other suit amended. *Emery v. Chappell*, 327.

PRACTICE.

Taxation—Constitutional Limitations—Equation Between Property and Poll Tax—Validity—Mandamus.—*Mandamus* to compel the commissioners of a county to collect a sufficient poll tax, under Article V, section 1, of the Constitution of North Carolina, is the proper remedy in an action by a taxpayer contending that a tax levied does not observe the constitutional equation between the poll and the property tax. *Railroad v. Commissioners*, 220.

PRESUMPTIONS. See Evidence, 11.

1. *Deeds and Conveyances—Property of Another—Intent.*—In the construction of a deed the presumption is that the grantor does not intend to convey property of another contained within the description of the land conveyed. Such intent must clearly appear. *Featherston v. Merrimon*, 199.

2. *Trespass—Damages—Pleadings—Allegations Sufficient.*—From every action of trespass the law infers some damages, and

PRESUMPTIONS—*Continued.*

an allegation that defendant did unlawfully, forcibly, etc., enter upon certain lands in plaintiff's possession and occupation is sufficient to sustain the action. *Bramĕ v. Clark*, 364.

3. *Deeds and Conveyances—Tax Deeds—Validity—Burden of Proof.*—One relying upon a tax deed for title to lands must show that the statutory requirements necessary to the validity of the deed have been met, for there is no legal presumption in favor of the validity of the deed otherwise than the statute provides. *Warren v. Williford*, 474.

PRESUMPTION OF POSSESSION. See Deeds and Conveyances, 21, 22.

PRESUMPTIVE EVIDENCE. See Evidence, 49.

PRIMA FACIE CASE. See Negligence, 17: Evidence, 49.

PRINCIPAL AND AGENT.

1. *Partnership — Retirement of Partner — Notice—Knowledge of Agent.*—Knowledge of the agent of facts relating to matters within the scope of his agency is knowledge of the principal; and when a sales and collection agent has been informed of the retirement of a partner from the firm, and thereafter at any time advances credit to the partnership, the retired partner is relieved of liability therefor. (*Cowan v. Roberts*, 133 N. C., 629, cited and distinguished.) *Straus v. Sparrow*, 309.

2. *Contracts in Writing—Parol Evidence—"Vary or Contradict."* It is incompetent to show that an agent of one of the parties to a written contract contemporaneously agreed with the other party, by parol, and as a part of the written contract, upon matters contradictory of and at variance with the express statement in writing that there was no such oral agreement. *Medicine Co. v. Mizell*, 384.

3. *Contracts in Writing—Waiver by Parol—Burden of Proof.*—In order to establish a waiver, by parol, of the express terms of a written contract by an agent of one of the parties, the burden of proof is on the party seeking to establish it. *Ibid.*

4. *Pleadings — Demurrer — Sales Agent Furnished—Damages.*—When it is alleged that defendant was to furnish plaintiff an experienced and successful sales agent for goods sold to it, and damages are claimed on account of the agent furnished having run away with plaintiff's horse and buggy and embezzled its funds, but it is not alleged that defendant knew that the character of the agent was bad, a demurrer to the

PRINCIPAL AND AGENT—*Continued.*

complaint should be sustained. The agent furnished by the defendant became the plaintiff's agent alone when it employed him. *Slaughter v. Machine Co.*, 471.

5. *Pleadings—Demurrer—Contracts—Counterclaim, When Available.*—In an action for damages claimed by reason of embezzlement by a sales agent furnished to plaintiff by defendant, it is admissible, under Revisal, sec. 481, for defendant to set up a counterclaim for the price of the machines it was alleged that the agent was furnished to sell, though the price for a part of the machines became due after the commencement of the action; for the counterclaim is a cause of action connected with the subject-matter of the action, and one arising on contract and existing at the commencement of the action on the contract. *Ibid.*

PRINCIPAL AND SURETY.

1. *Corporations—Contracts, Written—Sureties Signing as Officers—Parol Evidence.*—A written contract, expressed in clear and unambiguous terms, which is set up in the complaint and admitted in the answer, and which was made by a corporation and its stockholders, the latter being named as sureties, with a purchaser of stock, stating that upon demand one year from date the corporation will pay a sum certain for the stock thus bought, should he (the purchaser) so elect, cannot be varied by parol evidence so as to show that some of the stockholders signed only as officers of the company and not as sureties, though their official signatures appeared upon the instrument. (*Typewriter Co. v. Hardware Co.*, 143 N. C., 97, and other like cases, cited and distinguished.) *Basnight v. Jobbing Co.*, 350.

2. *Same—Form of Signature—Effect.*—In the body of a contract made by a corporation, guaranteeing certain conditions to a purchaser of shares of its own certificates of stock, it was stated that the corporation had signed as principal and its stockholders as sureties. Some of the stockholders, who were officers, signed the instrument, using their official designation: *Held*, (1) the form of the signature was unimportant and could not vary the clear intent expressed in the body of the instrument; (2) the intent of the sureties to bind themselves personally was not changed by the form of their signatures, for such a change would make the corporation its own surety, amounting in effect to no surety, as the debts of the corporation would have to be first paid. *Ibid.*

PROBATE. See Deeds and Conveyances, 1, 2, 3; Wills, 7.

PROCEDURE.

1. *Title to Office — Mandamus.* — Title to office cannot be determined by *mandamus*. *Burke v. Commissioners*, 46.

2. *Quo Warranto—Officer Inducted—Tender of Bond—Judgment Revoked.*—When an officer is in office by virtue of a judgment in *quo warranto* proceedings, and it is contended that he has not tendered a proper bond, he cannot be ousted, except when, upon application to the court, the judgment of induction is revoked for his failure to do so. *Ibid.*

3. *Appeal and Error—Facts Agreed—Exceptions.*—On an appeal from a judgment rendered upon an agreed state of facts no exception or assignment of error is necessary, as the appeal brings up the entire record and is an exception within itself. *Mershon v. Morris*, 48.

4. *Condemnation—Nonsuit—Defendant's Rights.*—In proceedings by one railroad company to condemn a right of way upon which another was lawfully constructing its roadbed the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after having obtained an order, in the progress of the case, giving it exclusive possession and ejecting the defendant from the *locus in quo*. *Railroad v. Railroad*, 59.

5. *Condemnation — Bond — Appeal — Liability.* — The amount of damages upon plaintiff's bond on appeal in condemnation proceedings may be assessed at the next term of the trial court, when a judgment below adverse to him is sustained on appeal. Revisal, sec. 1542. *Ibid.*

6. *Appeal and Error—No Substantial Right Affected.*—When in the proceedings appealed from there was a slight technical deviation from the usual procedure in like cases, but there was no substantial irregularity therein or prejudice to appellant's rights, he cannot be heard to complain on that account. *Bradburn v. Roberts*, 214.

7. *Same—Issues of Fact.*—It if appears, in an action for *mandamus* heard at chambers to compel a County Treasurer to pay over certain moneys on hand, in accordance with a statutory requirement, that issues of fact are involved or that the case has been improperly brought before the Judge there, it should be transferred so as to be tried during term and not dismissed. *Coleman v. Coleman*, 299.

8. *Summons — Judgment — Improper Service — Motion in the Cause.*—A motion to set aside a judgment for lack of service is the proper procedure, and it is for the court to find the facts and correct the record to speak the truth. If as a fact there was no proper service or appearance, the judgment is void. *Simmons v. Box Co.*, 344.

PROCEDURE—*Continued.*

9. *Motion in the Cause—Direct Proceedings.*—A motion in the cause, when appropriate, is a direct proceeding. *Ibid.*

10. *Corporation—Summons—Service—Foreman—Proper Officer.*—Service of summons on a foreman of a corporation, who acts under orders of a superintendent who is present at the time, is not upon a person on whom valid service for a corporation can be made. *Ibid.*

11. *Deeds and Conveyances—Deed in Escrow—Action for Possession.*—An action for the possession of a deed to lands held in escrow, alleging the fulfillment of the conditions thereof, involves the title to lands, not merely the delivery of the deed, and the ancillary or provisional remedy of claim and delivery will not lie. *Bridgers v. Ormond*, 375.

12. *Same—Judgment—Title—Jurisdiction—Removal of Causes.*—The effect of a verdict and judgment in an action for the delivery of a deed held in escrow, determining that the conditions thereof have been complied with, will be to transfer, not simply the deed, but the actual title to the land. If the deed should be destroyed, the judgment could be made to operate as a deed, or the court could decree the execution of another. Hence it was not error in the court below to order that the cause be removed to the county wherein the land is situated. (*Pasterfield v. Sawyer*, 132 N. C., 258; *s. c.*, 133 N. C., 44, cited and distinguished.) *Ibid.*

13. *State's Land—Entry—Same Lands—Dispute as to County.*—When the defendant, under Revisal, sec. 1709, is claiming to lay an entry, and asks a grant for land admitted to be the same as contained in plaintiff's grant, the plaintiffs entering their protest that the land lay in a certain county, and the defendant contending that the protest should be dismissed for that it lay in a different county, relief can be had in the pending cause, and it is not necessary to resort to an action of ejectment after defendant has perfected his grant. *Ullery v. Guthrie*, 417.

14. *Exceptions—Nonsuit.*—It is the more orderly course of procedure for the plaintiff, whose prayer for special instruction has been refused, to note exception, instead of taking a nonsuit. *Wilson v. Fisher*, 535.

PROCESS. See Procedure.

PROCESSIONING.

Surveyor—Consent Judgment—Compliance—Jurisdiction—Fraud or Mistake.—In proceedings for the processioning of lands consent judgment was entered in the Superior Court, to

PROCESSIONING—*Continued.*

which the case, on issue joined, had been transferred, that the plaintiff was the owner and entitled to the quiet possession of the land, the boundary to which was in dispute; that a surveyor be appointed to run, mark and establish the corners and lines and file a report of same with the Clerk, to be recorded as a part of the minutes in the action. The surveyor, after notice and in the presence of the parties and others, located the line and made full report to the court, including a map of the lands located: *Held*, (1) under Revisal, sec. 614, the Judge in term time had full jurisdiction to hear and determine all matters in controversy and enter the judgment as above; (2) the court subsequently had no power to modify or set the judgment aside, except for fraud or the mistake of both parties. *Rogers v. Sluder*, 43.

PROPERTY DISPOSED OF. See Wills, 8.

PROXIMATE CAUSE. See Negligence, 12, 13, 14; Contributory Negligence, 3.

PUBLIC OFFICER. See Quo Warranto, 2, 3, 4.

PUBLIC RIGHTS. See Condemnation Proceedings, 8.

PURCHASE BY TENANT. See Tenants in Common, 1.

QUESTIONS FOR COURT.

Railroads—Negligence—Evidence—Modern Equipment—"Bumpers."—When a recovery against a railroad company is sought upon the ground that its train was furnished and equipped with automatic couplers, but that the bumpers had not been removed therefrom; that plaintiff's intestate was injured while coupling the cars as the engine was taking up slack, the mere fact that the bumpers were permitted to remain on the cars raises no question of negligence for the jury, when it appears from the other testimony that the bumpers were then in general use on cars of that character. *Dermid v. Railroad*, 180.

QUESTIONS FOR JURY.

1. *Measure of Damages—Value of Shares.*—W., M. and C. owned all the shares of stock in a manufacturing corporation, of which W. had the general management. After some bargaining between W. on the one hand and M. and C. on the other, the latter agreed for a certain price to buy the stock of the former, and gave their note for it. Upon this note suit was brought by W. and M., and C. set up by way of counterclaim a demand for damages for breach of warranty.

QUESTIONS FOR JURY—*Continued.*

There was evidence that W. furnished or caused to be furnished to M. and C. a statement, corroborated by the books, that the indebtedness of the company was in a certain sum, but in fact it was much greater, and could not have been known or ascertained by M. and C. until after the close of the transaction. There was no evidence of fraudulent intent on the part of W.: *Held*, (1) that it is not necessary that a warranty be made in express terms, and that an affirmation of a material fact intended and relied upon as an inducement to the trade may be sufficient; (2) there was evidence sufficient to go to the jury upon the question of express warranty; (3) the measure of damages was not the difference between the represented and actual indebtedness, but only as it affected the value of the stock bought. *Wrenn v. Morgan*, 101.

2. *Corporations—Subscription Note—False Representations—Defenses—Laches.*—In a suit by a trustee in bankruptcy on a note given for the purchase price of shares of stock in a corporation insolvent at the time, when the defense is that the subscription was induced by fraudulent misrepresentations of the corporation's president that the company was solvent, evidence upon the question of laches of the subscriber should be submitted to the jury, which tends to show that the subscriber was fifty-three years old, a man of affairs, lived in the vicinity, knew when he made the subscription that the corporation had given indications of weakness and had for a time been in the hands of a receiver; that a cursory examination of the books, accessible to him, would have disclosed that, of $25,000 of stock issued, only $4,300 had been paid in; that a large amount of the corporation indebtedness was evidenced by mortgages duly registered, and that he had been told that the company was totally insolvent and likely to go into bankruptcy. *Chamberlain v. Trogden*, 139.

3. *Partnership—Retirement of Partner—Notice.*—Upon the question of notice to a creditor of a partnership, residing at a distance, of the retirement from the firm of one of the partners, whereon depends the liability of the retiring partner for a debt subsequently contracted with the creditor by the partnership, publication of notice in a local paper is not as a rule recognized as sufficient; but when it is further shown in evidence that notice was thus published for sixty days, and that a copy containing the publication was sent to the creditor, these additional facts, while not conclusive, would present a case for the consideration of the jury on the question of notice. *Straus v. Sparrow*, 309.

QUESTIONS FOR JURY—*Continued.*

4. *Mortgagor and Mortgagee—Assignee of Bond—Coprincipals—Debtor and Creditor — Subrogation and Contribution — Restraining Orders.*—E. and W. executed their bond to S., secured by mortgage on two tracts of land held by each in severalty, which was subsequently assigned to defendant. W. conveyed his tract to plaintiff, and it was sold under foreclosure and purchased by defendant G. The plaintiff obtained a restraining order to prevent payment of the purchase price and completion of sale, on the ground that E. and W. were coprincipals, and that, as W. was insolvent, plaintiff was entitled to be subrogated to his rights, and contribution against E.: *Held*, (1) contribution can arise only after payment by one of the debtors; (2) whether W. can recover out of E. is a question for the jury; (3) the mortgagee or the assignee of the bond cannot be required to defer collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves; (4) the restraining order was properly dissolved. *Lumber Co. v. Satchwell*, 316.

5. *Mortgagor and Mortgagee — Sale of Mortgaged Property — Purchaser—Surrender in Law—Measures of Damages.*—Defendant represented to plaintiff that he had a mortgage on a certain horse plaintiff had bought, whereupon plaintiff replied that if the horse was defendant's property he could go and get him. This the defendant afterwards did in plaintiff's absence. Subsequently plaintiff ascertained that defendant's mortgage had not been registered at the time of his purchase, and brought claim and delivery proceedings. Defendant replevied and then sold the horse: *Held*, (1) that defendant's taking the horse under the circumstances was not a surrender in law by the plaintiff; (2) that the question of laches as to defendant's registering the mortgage has no application, as he should have retained the possession until the mortgage was registered; (3) that the amount of recovery should be the value of the horse at the time it was wrongfully taken, with interest therefrom, and the amount paid for the horse by plaintiff was only to be considered by the jury upon the question of such value. *Taylor v. Mills*, 415.

6. *Carriers of Passengers—Steamboats—Passenger Overboard—Rescue—Negligence—Evidence.*—After discovering the peril of a passenger who had fallen overboard into the water from defendant's steamboat while on her trip, it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of the ship and the other passengers, to rescue him; and evidence of negligence in the

QUESTIONS FOR JURY—*Continued.*

performance of this duty is sufficient to be passed on by the jury which tends to show unnecessary confusion and delay, that the bateau used was leaky and unfit and not properly manned, that there were no lights, and that with reasonable alacrity and proper help the boat might have reached the spot where the passenger sank in time to have saved him. *Pate v. Steamboat Co.*, 571.

7. *Dangerous Spur Tracks—Moving Cars—Contributory Negligence—Proximate Cause.*—While, ordinarily, jumping on or off a moving car is such contributory negligence as will bar a recovery for injuries received, it is for the jury to say whether a man of ordinary prudence would under similar circumstances have done so, when it appears that the car on which plaintiff was engaged in the course of his employment was derailed, owing to the unsafe condition of the spur track, unknown to him, and he jumped from it when he suddenly found himself in a dangerous position as it was leaving the track, though subsequent developments may show that he otherwise would not have been injured. *Dortch v. Railroad*, 575.

8. *Instruments—Evidence—Burden of Proof.*—When it has been established or there is allegation and evidence tending to show that a negotiable instrument was procured by fraud, in a suit by one claiming to be the holder in due course, it was error for the trial Judge, upon supporting evidence, to charge the jury that the *prima facie* case of the plaintiff was restored by his uncontradicted testimony; that he acquired the note in the usual course of business, before maturity and without notice of any vice in it, as the burden of proof thereof was upon plaintiff, and the question as to the issue and the credibility of the evidence thereon was one for the jury.—*Bank v. Fountain*, 590.

QUO WARRANTO.

1. *Cities and Towns—Powers of Commissioners.*—Under Revisal, sec. 2917, "The corporate powers (of towns and cities) can be exercised only by the board of commissioners or in pursuance of resolutions adopted by them, unless otherwise provided by law," and the power of a town to remove a public officer for cause is one of the common-law incidents to all corporations. *Burke v. Jenkins*, 25.

2. *Same—Public Officer—Removal for Cause.*—It is within the powers of the town commissioners to remove, upon notice, the town treasurer from office for disobeying their orders in paying certain indebtedness and not refunding when so paid. *Ibid.*

QUO WARRANTO—*Continued.*

3. *Same—Review by Courts.*—When it is allowable for the town commissioners to remove the town treasurer for cause, the soundness of the cause is reviewable by the courts upon a *quo warranto*, but a trial by jury is not required. *Ibid.*

4. *Judgment upon Pleadings—Demurrer.*—When the Judge in the lower court renders judgment upon the pleadings restoring the relator in *quo warranto* to his office, the proceedings are in the nature of judgment upon demurrer, in which the allegations must be taken as true. *Ibid.*

5. *Officer Inducted—Tender of Bond—Judgment Revoked—Procedure.*—When an officer is in office by virtue of a judgment in *quo warranto* proceedings, and it is contended that he has not tendered a proper bond, he cannot be ousted, except when, upon application to the court, the judgment of induction is revoked for his failure to do so. *Burke v. Commissioners*, 46.

RACE DISCRIMINATION. See Constitutional Law, 4.

RAILROADS.

1. *Trespassers—Negligence, Concurrent—"Look and Listen."*—It is the duty of a trespasser upon a railroad track both to look and listen for approaching trains, and when by looking the injury complained of would have been avoided, his negligence in this respect is concurrent, and damages are not recoverable by him incurred on that account. *Beach v. Railroad*, 153.

2. *Same.*—An engineer on a moving train has the right to expect that a trespasser on the track has exercised due care in looking as well as listening for approaching trains; and, though there may have been observed by him an engine standing near the place of the injury, which was evidently making noises to interfere with hearing the approach of his train, the duty of the trespasser to look is not diminished, but increased. *Ibid.*

3. *Same—Nonsuit.*—When it is shown by the evidence that plaintiff's intestates were trespassers on defendant's railroad track, walking in front of an approaching train in the direction the train was moving; that it was a bright day and the track of defendant was straight at that place; that there was no obstruction to prevent their seeing the train for a distance of from one-half to three-fourths of a mile, or the engineer from seeing them; that the engineer, on approaching, seeing they did not leave the track, sounded the danger signal and applied the brakes in a fruitless effort to avoid killing them; that the engineer saw an engine standing near the place of the accident, and before it occurred, evidently

RAILROADS—*Continued.*

making noises to prevent their hearing the approaching train, a motion as of nonsuit upon the evidence was properly sustained. *Ibid.*

4. *Contributory Negligence—Coupling Cars—Nonsuit.*—When as a necessary consequence in coupling together freight cars onto a train the engine must back upon them to take up slack, it is contributory negligence on the part of the conductor to signal the engine for this purpose and then go at once between the cars to couple together the air-brake hose beneath them, when from his experience he knew of the danger of doing so; and upon such evidence by plaintiff a motion of nonsuit should be granted. *Dermid v. Railroad*, 180.

5. *Same—Safe Methods.*—When there is a safe and usual way and an unsafe way to couple cars to a freight train, and a conductor of long experience, having knowledge of the usually safe way, assumes to act therein for the brakeman, whose duty it was, but in the manner known by him to be dangerous, his thus acting will bar a recovery in a suit for damages for injury thereby caused to him. *Ibid.*

6. *Negligence—Modern Equipment—Injury from Another Cause.*—When the damages complained of were not caused by failure of a railroad to equip its trains with automatic couplers or the latest and most approved devices, the principles of law enunciated in those instances are not applicable. *Ibid.*

7. *Negligence—Evidence—Coupling Cars.*—Evidence of negligence is not sufficient which merely shows that, in obedience to a signal from the conductor, the engineer took up the slack in his train of freight cars and thereby injured the conductor, who, immediately after signalling, went between the cars unexpectedly for the purpose of coupling them. *Ibid.*

8. *Negligence—Evidence—Modern Equipment—"Bumpers"—Questions for Court.*—When a recovery against a railroad company is sought upon the ground that its train was furnished and equipped with automatic couplers, but that the bumpers had not been removed therefrom; that plaintiff's intestate was injured while coupling the cars as the engine was taking up slack, the mere fact that the bumpers were permitted to remain on the cars raises no question of negligence for the jury, when it appears from the other testimony that the bumpers were then in general use on cars of that character. *Ibid.*

9. *Right of Way, Construction of—Improper Drainage—Damages.* A railroad company is liable in damages for negligently and improperly stopping the drain ditches on plaintiff's land,

RAILROADS—*Continued.*

so as to injure his crop by the water flowing thereon from his own and adjoining lands, incidental to the building and ditching of its roadbed, though the right of way through plaintiff's land may previously have been purchased or regularly acquired by condemnation proceedings. *Davenport v. Railroad*, 287.

10. *Same—Evidence—Instructions—Accumulated Waters.*—In an action for damages to crops, brought against railroad companies, incident to the negligent construction of the companies' roadbed, whereby the crops of plaintiff were injured by the usual flow of water upon his own and from upper and adjoining lands, there was evidence tending to show that, prior to the building of the roadbed, plaintiff's land was drained by a number of lead ditches into which a number of smaller ditches on his land emptied; that defendants, in constructing their roadbed, crossed all these ditches, leaving openings with pipes in them for the drainage of the lead ditches, but closing the smaller ditches; that for the increase of flow of the water caused by the ditching and construction of the roadbed the pipes for carrying the water off in the lead ditches were insufficient: *Held*, (1) the trial Judge properly instructed the jury, if they believed the evidence, to award damages in full compensation for the injury arising in consequence of the stoppage of the small ditches, and that the openings for the passage of water through the lead ditches should have been sufficient to allow the water to pass through, with adequate piping, and the ditches should have been properly opened for the passage of the water; (2) that defendants had the right to cut a ditch, when necessary, from adjacent lands along their roadbed across plaintiff's land, but it was the duty of the defendants to have the leading and lateral ditches of sufficient capacity to carry off the additional quantity of water thereby caused to flow on plaintiff's land. *Ibid.*

11. *Same:*—A prayer for instruction that a railroad company, in constructing its roadbed, had the right to accumulate the water which would naturally flow onto plaintiff's lands and convey the same by lateral ditches in and upon his lands, concluding "and for damages incident to this right no recovery can be had," is erroneous, when there is evidence tending to show that there was no sufficient drainage provided by the defendants for carrying it off. *Ibid.*

12. *Evidence, Opinion—"Expert Testimony" Upon the Facts—Improper Drainage—Damages to Crops.*—Testimony of a witness who has had personal observation of the facts, and from practical training and experience is qualified to give an opin-

RAILROADS—*Continued.*

ion thereon, is competent to show the damage to his crop by reason of an overflow of water on his land, caused by improper construction by defendants of their roadbed thereon, and he may testify to the number of acres in cultivation of each kind of crop, the amount of each he would have made except for the injury, and the price for which he could have sold it. *Ibid.*

13. *Rights of Way—Ejectment—Parties—Permanent Damages—Pleadings.*—In an action for damages against a railroad company for unlawfully entering upon lands of plaintiffs and wrongfully occupying them for a right of way, it appears that one of the plaintiffs had, previously to the commencement of the action, conveyed the land to his coplaintiffs, who reconveyed it to him thereafter; further, that the company had entered on, constructed and was operating its railroad on the *locus in quo*. The plaintiffs, who were the owners of the land at the time of the commencement of the action, filed no complaint: *Held*, (1) damages for the entire wrong—past, present and prospective—should be had in one action, and on payment thereof by the company an easement passed to it, as in proceedings in ejectment; (2) it was necessary to retain all the parties to the action in order to protect the defendant from other and further recoveries for the same cause, though the court would not compel those of the plaintiffs who had not done so to file complaints; (3) the company could not be ousted by an action of ejectment. *Porter v. Railroad*, 563.

14. *Dangerous Spur Tracks—Negligence.*—It is the duty of a railroad company to keep its sidings and spur tracks in a reasonably safe condition for the traffic done over them; and when in the discharge of his duties an employee is killed by reason of a derailment of the car on which he was engaged, caused by the rails being out of alignment, a *prima facie* case of negligence is established. *Dortch v. Railroad*, 575.

15. *Employer and Employee—Dangerous Spur Tracks—Moving Cars—Contributory Negligence—Proximate Cause.*—Contributory negligence on the part of deceased employee in not fastening the brakes to a car before endeavoring to couple it to the engine on a down grade spur track, and jumping upon the car in order to save it when it was in rapid motion, is not the proximate cause of his death, when it appears that the death resulted from a derailment, owing to the fact, unknown to deceased, that the rails were out of alignment. *Ibid.*

RAILROADS—*Continued.*

16. *Same—Questions for Jury.*—While, ordinarily, jumping on or off a moving car is such contributory negligence as will bar a recovery for injuries received, it is for the jury to say whether a man of ordinary prudence would under similar circumstances have done so, when it appears that the car on which plaintiff was engaged in the course of his employment was derailed, owing to the unsafe condition of the spur track, unknown to him, and he jumped from it when he suddenly found himself in a dangerous position as it was leaving the track, though subsequent developments may show that he otherwise would not have been injured. *Ibid.*

RATIFICATION. See Cities and Towns, 13.

REASONABLE STIPULATIONS. See Carriers of Freight, 17, 18.

REASONABLE TIME. See Carriers of Freight, 8.

REBUTTAL. See Evidence, 31, 49.

RECEIVER'S TITLE. See Corporations, 3.

RECORDS. See Evidence, 48; Appeal and Error, 4, 11.

REDEMPTION. See Mortgagor and Mortgagee, 1.

REFERENCE. See Mortgagor and Mortgagee, 10.

REFORMATION. See Contracts, 1.

REGISTRATION. See Deeds and Conveyances, 1, 2, 3.

REGISTRATION BOOKS. See Bond Issues, 10.

REHEARING, MATTERS CONSIDERED. See Appeal and Error, 1.

REMAINDERS. See Wills, 6.

REMEDIES, EQUITABLE. See Mortgagor and Mortgagee, 1; Pleadings, 6.

REMOVAL. See Executors and Administrators, 4.

REMOVAL OF CAUSE. See Quo Warranto, 2.

Judgment—Title—Jurisdiction.—The effect of a verdict and judgment in an action for the delivery of a deed held in escrow, determining that the conditions thereof have been complied with, will be to transfer, not simply the deed, but the actual title to the land. If the deed should be destroyed, the judgment could be made to operate as a deed, or the court could decree the execution of another. Hence it was not error in the court below to order that the cause be removed to the county wherein the land is situated. (*Pasterfield v. Sawyer*, 132 N. C., 258; *s. c.*, 133 N. C., 44, cited and distinguished.) *Bridgers v. Ormond*, 375.

REPRESENTATIONS, FALSE. See Corporations, 7.

REPUDIATION. See Guardian and Ward, 1.

RES ADJUDICATA. See Judgments, 12.

RESERVATION. See Deeds and Conveyances, 6.

RESIDUARY CLAUSE. See Wills, 1, 2.

RESIDUE OF A RESIDUE. See Wills, 1, 2.

RETIREMENT OF PARTNER. See Partnerships, 1, 2, 3.

RETROSPECTIVE EFFECT. See Stare Decisis, 2.

REVIEW BY COURTS. See Quo Warranto, 3.

REVISAL. Reference should be made to the various subject-matters for accuracy.

SEC.

59. The wrongful death of intestate must be shown to bring the right of action therefor within the language of this section as a condition annexed. A controversy over administration is no legal excuse. *Gulledge v. Railroad*, 567.

400. Consignor shipping goods to be sold for his own benefit is "party aggrieved" and proper party plaintiff. *Robertson v. Railroad*, 323.

481. A counterclaim for the price of a machine an agent was employed to sell may be set up in an action for damages for embezzlement of the agent against the one having furnished the agent.—*Slaughter v. Machine Co.*, 471.

507. Slight variation between allegation and proof disregarded. Amendment. *Andrews v. Grimes*, 437.

737. Entry on State's land and dispute as to county in which located. *Ullery v. Guthrie*, 417.

1479. A justice's judgment docketed in the Superior Court becomes a judgment of that court for the purposes of the lien, and when suit is brought thereon it must be within seven years and in the justice's court. *Oldham v. Rieger*, 548.

1542. Damages assessed on plaintiff's bond on appeal in condemnation proceedings assessed at next term of trial court. *Railroad v. Railroad*, 59.

1545. Amendments allowed to conform allegations to proof in Supreme Court. 437.

2201. When it is shown that a negotiable instrument was procured by fraud, one claiming to be a holder in due course must show he acquired title before maturity, good faith, without notice of defect in person negotiating it. *Bank v. Fountain*, 590.

REVISAL—*Continued.*

SEC.

2212. Liability as endorser on negotiable instrument. *Perry v. Taylor*, 362.

2213. Liability as endorser on negotiable instrument. *Perry v. Taylor*, 362.

2219. Liability as endorser on negotiable instrument. *Perry v. Taylor*, 362.

2239. Liability as endorser on negotiable instrument. *Perry v. Taylor*, 362.

2513. Relief, when sale of lands is confirmed in partition proceedings, is by motion in the cause. *Hargrove v. Wilson*, 439.

2580. Requisites as to petition in condemnation proceedings strictly complied with. *Railroad v. Railroad*, 59.

2580. Appeal from clerk in condemnation proceedings takes up entire record for review. The findings of fact are not conclusive. *Railroad v. Railroad*, 59.

2587. Appeal from clerk in condemnation proceedings takes up entire record for review. The findings of fact are not conclusive. *Railroad v. Railroad*, 59.

2632. Consignor shipping goods to be sold for his own benefit is "party aggrieved." *Robertson v. Railroad*, 323.

2632. Penalty for delay in shipment is given directly to party aggrieved and not required to be brought "on relation of State." Amendment of pleadings. *Robertson v. Railroad*, 323.

2634. An action against a carrier for damages to goods and to recover a statutory penalty are separable causes. *Albritton v. Railroad*, 485.

2634. When the amount of claim is established by agreement it is sufficient for a recovery of a penalty under this section. *Albritton v. Railroad*, 485.

2634. Certain penalties imposed on carriers for failure to perform certain duties are not unconstitutional. *Iron Works v. Railroad*, 469.

2634. Action for damages for lost shipment and for penalty for delay may be joined in one action. *Robertson v. Railroad*, 323.

2644. Certain penalties imposed on corporations for failure to perform certain duties are not unconstitutional. *Iron Works v. Railroad*, 469.

2917. The exercise of corporate powers of a town must be by the board of commissioners. *Burke v. Jenkins*, 25.

REVISAL—*Continued.*

SEC.

2930. No liability of a municipality for damages for street improvements when the commissioners have acted with due care and skill. *Dorsey v. Henderson*, 423.

3983 *et seq.* Readjustment of rights and duties of adjoining owners for draining lands are not concluded by judgment; they are in effect a motion in the cause, and can be brought forward from time to time upon notice. *Staton v. Staton*, 490.

4115. Tax on poll may be levied in excess of $2 for the purposes of a school district, when approved by the qualified voters, as required by the Constitution, without affecting the right of suffrage. *Perry v. Commissioners*, 521.

REVOCATION. See Cities and Towns, 11.

RIGHTS OF HOLDER. See Negotiable Instruments, 6.

RIGHT OF WAY. See Railroads, 9, 10, 13.

RIGHT TO VOTE. See Constitutional Law, 21.

RULE OF PROPERTY. See Stare Decisis, 1.

SAFE APPLIANCES. See Evidence, 9.

SAFE METHOD. See Contributory Negligence, 2.

SALE OF GOODS. See Contracts, 22.

SALE OF MORTGAGED PROPERTY. See Mortgagor and Mortgagee, 8.

SALE, POWER OF. See Mortgagor and Mortgagee, 2, 3, 4.

SCHOOL DISTRICTS. See Municipal Corporations, 1; Constitutional Law, 2, 3, 4.

SCHOOLS, PUBLIC. See Municipal Corporations, 2.

SCHOOL PURPOSES. See Taxation, 4, 5.

SEAL. See Corporations, 2.

SEDUCTION. See Pleadings, 13; Damages, 6, 7; Husband and Wife, 2.

SEPARABLE CAUSES. See Penalty Statutes, 10.

SERVICE OF PROCESS. See Procedure, 10.

SHARES OF STOCK. See Measure of Damages, 5.

SIDEWALKS. See Bond Issues, 6.

SINGLE LIABILITY. See Negligence, 12, 13.

SPECIAL CIRCUMSTANCES. See Measure of Damages, 3, 4.

SPECIAL TAX. See Taxation, 8, 14, 15; Municipal Corporations, 2.

SPECIFIC PERFORMANCE. See Contracts, 19.

SPUR TRACK. See Negligence, 20; Contributory Negligence, 3.

STANDARD FORM. See Insurance, 5, 6.

STARE DECISIS.

1. *Rule of Property—Uniformity of Decisions—Commercial Law.* While the doctrine of *stare decisis* is one of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents, and the courts will adhere to a decision, found to be erroneous, when it has been acquiesced in for so great a length of time as to become accepted law, constituting a rule of property, it should not be extended and applied to a decision which is clearly erroneous and which injuriously affects a general business law. *Mason v. Cotton Co.*, 492.

2. *Same—Decision Overruled—Retrospective Effect.*—A decision of a court of supreme jurisdiction overruling a former decision is as a rule retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was law; and this principle should apply to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods. *Ibid.*

STATE'S LANDS.

Entry—Same Lands—Dispute as to County—Procedure.—When the defendant, under Revisal, sec. 1709, is claiming to lay an entry, and asks a grant for land admitted to be the same as contained in plaintiff's grant, the plaintiffs entering their protest that the land lay in a certain county, and the defendant contending that the protest should be dismissed, for that it lay in a different county, relief can be had in the pending cause, and it is not necessary to resort to an action of ejectment after defendant has perfected his grant. *Ullery v. Guthrie*, 417.

STATUTES, INTERPRETATION OF. See Interpretation of Statutes.

STATUTES OF ANOTHER STATE. See Telegraph Companies, 6.

STEAMBOAT.

Carriers of Passengers — Passenger Overboard — Rescue — Negligence—Evidence—Questions for Jury.—After discovering the peril of a passenger who had fallen overboard into the water

STEAMBOAT—*Continued.*

from defendant's steamboat while on her trip, it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of the ship and the other passengers, to rescue him; and evidence of negligence in the performance of this duty is sufficient to be passed on by the jury which tends to show unnecessary confusion and delay, that the bateau used was leaky and unfit and not properly manned, that there were no lights, and that with reasonable alacrity and proper help the boat might have reached the spot where the passenger sank in time to have saved him. *Pate v. Steamboat Co.*, 571.

STIPULATION VOID. See Deeds and Conveyances, 28.

STOCKHOLDERS. See Injunctions, 1.

1. *Corporations—Subscription Note—False Representations—Defenses—Laches.*—While one who has subscribed to the stock of a corporation and given his note therefor may, as a valid defense to an action by the trustee in bankruptcy subsequently appointed, set up that the note was given by reason of false and fraudulent representations on the part of the president as to solvency, when the company at the time in question was insolvent, he must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation. *Chamberlain v. Trogden*, 139.

2. *Same—Questions for Jury.*—In a suit by a trustee in bankruptcy on a note given for the purchase price of shares of stock in a corporation insolvent at the time, when the defense is that the subscription was induced by fraudulent misrepresentations of the corporation's president that the company was solvent, evidence upon the question of laches of the subscriber should be submitted to the jury, which tends to show that the subscriber was fifty-three years old, a man of affairs, lived in the vicinity, knew when he made the subscription that the corporation had given indications of weakness and had for a time been in the hands of a receiver; that a cursory examination of the books, accessible to him, would have disclosed that, of $25,000 of stock issued, only $4,300 had been paid in; that a large amount of the corporation indebtedness was evidenced by mortgages duly registered, and that he had been told that the company was totally insolvent and likely to go into bankruptcy. *Ibid.*

STRANGERS. See Negotiable Instruments, 8.

STREETS. See Bond Issues, 6; Cities and Towns, 11, 12.

SUBSCRIPTION NOTE. See Corporations, 7.

SUBROGATION. See Mortgagor and Mortgagee, 5.

SUBSTANTIAL DAMAGES. See Damages, 9.

SUBSTANTIAL RIGHT. See Appeal and Error, 12.

SUFFRAGE. See Constitutional Law, 21.

SUIT BY CONSIGNOR. See Measure of Damages, 9.

SUMMONS. See Procedure, 8, 9, 10.

SUPPLEMENTAL PROCEEDINGS.

1. *Water and Water Courses—Drainage of Lands—Motion in the Cause.*—When the rights and duties of adjoining landowners as to drainage in a certain canal have been determined under the Drainage Act (now Revisal, ch. 88), and judgment entered, proceedings subsequently brought for the purpose of readjustment, owing to change of ownership and partition, etc., are in effect a motion in the cause, in which the judgment, unlike a final judgment, is not conclusive; and the cause can be brought forward from time to time, upon notice to the parties, and further decrees made to conform to the exigencies and changes which may arise. *Staton v. Staton*, 490.

2. *Water and Water Courses—Drainage of Lands—Petition—Description—Amendments.*—A petition in proceedings brought for the purpose of readjusting the rights and duties of adjoining landowners in draining their lands into a certain canal is not uncertain because it does not restate the *termini* of the canal which sufficiently appear in the original proceedings; and, if otherwise, the petitioner should be allowed to amend. *Ibid.*

SURRENDER IN LAW. See Mortgagor and Mortgagee, 8.

TAXATION. See Bond Issues.

1. *School Districts Within Municipality—Town Commissioners—Constitutional Law.*—An act creating a school district within the limits of a town and authorizing a vote upon the question of issuing bonds within the district prescribed, by taxation on property and polls therein, is not void by reason of a provision that the board of commissioners of the town were designated to call the election and have the usual powers incident to the issue and levy. *McLeod v. Commissioners*, 77.

2. *Same—School Districts Within Municipality—Vote of the People—Constitutional Law.*—An act creating by clearly expressed language a prescribed school district within the corporate limits of a town, and providing for an indebtedness and levy by taxation upon the property and polls within that

TAXATION—*Continued.*

district for school purposes, and in another part there are expressions to the effect that the tax so levied "shall be" for the support of schools in said town, and the purchase of land and erection of school buildings thereon "with money raised by issuing bonds of the town," as provided for, when construed as a whole, does not impose a debt upon the poll and property in the town outside of the prescribed school district, and is not, therefore, unconstitutional as being without the consent of the people living in the town beyond the school limits. *Ibid.*

3. *Cities and Towns—Debt—Necessaries—Bond Issue.*—The governing authorities of a town may, in the exercise of good business prudence and under existing conditions rendering such course desirable and proper, issue bonds for the present or ultimate payment of a debt lawfully incurred for the necessary expenses of the town. *Commissioners v. Webb*, 120.

4. *Counties—Bond Issues, Validity of—Levy—Constitutional Limitations — School Purposes — Necessaries.*—County bonds issued by a popular vote of the county for training-school purposes, under legislative authority, without provision to exceed the constitutional limitation of levy for principal, interest or for a sinking fund, are valid and a good tender, under a contract with the purchasers calling for the delivery of valid bonds, though they are not for necessary purposes. *Commissioners v. MacDonald*, 125.

5. *Same.*—When bonds are issued by a county by popular vote, under legislative authority, which does not further provide for a levy to exceed the constitutional limitation for principal, interest or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction. State Constitution, Art. VII, sec. 7. (*Charlotte v. Shepard*, 122 N. C., 602, where the bonds were issued by a town, cited and distinguished.) *Ibid.*

6. *Constitutional Limitations—Equation Between Property and Poll Tax — Validity — Practice — Mandamus.*—*Mandamus* to compel the commissioners of a county to collect a sufficient poll tax, under Article V, section 1, of the Constitution of North Carolina, is the proper remedy in an action by a taxpayer contending that a tax levied does not observe the constitutional equation between the poll and the property tax. *Railroad v. Commissioners*, 220.

7. *Entire Levy—Valid and Invalid Apportionable—Injunction.*—It is the practice, enforced usually by statute, for the court not to enjoin the collection by a board of county commis-

TAXATION—*Continued.*

sioners of an entire levy of taxes if the portion conceded in a suit by a taxpayer to be valid can be separated from the portion alleged to be unconstitutional. *Ibid.*

8. *Constitutional Law—Interpretation of Statutes—Construed as a Whole—Special Tax—Validity.*—Article V, section 1, of the State Constitution, providing an equation between the poll and property tax, and section 6 thereof, requiring that "the tax levied by the commissioners of the several counties for county purposes shall never exceed the double of the State tax, except for a special purpose and with the special approval of the Legislature"; and Article VII, section 7, thereof, prescribing the limitations upon the counties, etc., to contract debts for other than necessary expenses, should be construed in relation to each other, and thereunder a special tax voted by the people of a county, specially authorized by the Legislature, is not unconstitutional by reason of an increase thereby of the property tax over the constitutional equation between the general property and the poll tax. *Ibid.*

9. *Constitutional Law—Poll Tax Not to Exceed $2.*—The last clause in Article V, section 1, of the State Constitution, limiting "the State and county capitation tax combined," so as not to exceed $2 on the head, is imperative. *Ibid.*

10. *Special Purpose—County Commissioners—Ministerial Duties—Injunction.*—The courts, at the suit of a taxpayer, will not enjoin a tax levy made by a board of county commissioners in pursuance of their ministerial duty, for that they did not wisely exercise their discretion in fixing a greater rate of taxation on the $100 worth of property than was necessary for the purpose of paying the interest on a special indebtedness of the county, when practically all of the other taxpayers of the county have paid the tax in pursuance of the levy and the statutory limit has not been exceeded. *Ibid.*

11. *Same—Excess Levy, How Applied.*—When a tax has been levied for the special purpose of paying the interest on special-tax county bonds it must be exclusively applied to that purpose; and if, by any error in the judgment of the county commissioners, a greater property tax rate has been levied than was necessary, the commissioners have no power to apply the excess to a different use. Should they attempt to do so, an injunction will lie at the suit of a taxpayer. *Ibid.*

12. *Statutes in Violation of Contracts — Parties — Constitutional Questions, by Whom Raised.*—When a taxpayer has not shown that any rights of his in relation to a bond issue by a county have been affected, he cannot avail himself of the

TAXATION—*Continued.*

contention that a subsequent statute, repealing the statute under the provisions of which the issue was made, violated the obligations of a contract. *Ibid.*

13. *No Direction of Levy of Poll Tax—No Repealing Statute.*—The only difference between the facts found in this case and those in the case immediately preceding being that the statute in this case does not in express terms direct that a poll tax be levied, and that there is no repealing act directing the levy of a poll tax or the levying of such tax beyond the sum of $2: *Held*, the digest in that case is fully applicable to this one on all points. *Railroad v. Commissioners*, 248.

14. *Poll Tax Increased Over $2—State and County Tax—Special Taxation—Constitutional Law.*—A special-school district created under Revisal, sec. 4115, may levy a tax on the poll, when submitted to and approved by the qualified voters thereof in an election duly held, in excess of $2, under the provisions of Article VII of the State Constitution. The equation between the property and poll tax established by Article V, sec. 1, and the restriction that the State and county tax combined shall never exceed $2 on the poll, applies only to State and county taxation, and not to municipal or *quasi* public corporations other than counties. *Perry v. Commissioners*, 521.

15. *Same—Right to Vote.*—Article VI, sec. 4, of the Constitution, depriving a citizen of the right to vote unless he has paid his tax for the previous year, refers to the poll tax prescribed by Article V, sec. 1, to-wit, that for State and county purposes, and it can never exceed $2. This right of suffrage is therefore in no way affected by any increase of taxation imposed on these special-tax districts. *Ibid.*

TAX DEEDS. See Evidence, 52, 53.

TELEGRAMS. See Telegraph Companies.

TELEGRAPH COMPANIES.

1. *Negligence — Messages, Delay in Delivery of — Prima Facie Case—Burden of Proof.*—When the failure of a telegraph company to deliver a message is shown, a *prima facie* case of liability is made out, and the burden of proof is upon the company to show facts excusing its failure. *Woods v. Telegraph Co.*, 1.

2. *Same—Duty of Company—Evidence—Nonsuit.*—Upon plaintiff's evidence, tending to show that a telegram was addressed to No. 38 D. Street, where it could not have been delivered, and when the addressee lived in the rear of No. 83

TELEGRAPH COMPANIES—*Continued.*

D. Street, where delivery could have been made, and defendant introduced no evidence, it was error in the trial Judge to sustain a motion as of nonsuit upon the evidence, as it then was incumbent upon the defendant to show such reasonable inquiry and the exercise of that degree of care required of it under the circumstances to excuse the failure to deliver. *Ibid.*

3. *Negligence—Message—Wrong Address—Delivery—Reasonable Efforts—Evidence—Idem Sonans.*—When a telegram was addressed to the wrong street number, where it could not have been delivered, it was incumbent upon the defendant to use such reasonable efforts to deliver it as required when no number is given; and the city directory containing the name of addressee, of Jay Wood for Jay Woods, with his correct dress, it is sufficient evidence of negligence for the jury to consider. *Ibid.*

4. *Same—"Service" Message—"Better Address."*—When the addressee of a message cannot, after due search, be found at the terminal point, a failure of the telegraph company to wire the sending office for a better address is some evidence of its negligence. *Ibid.*

5. *Death Message—Defense—Seeing the Body.*—It is not sufficient to bar a recovery for actual damages for failure of a telegraph company to deliver a message announcing a death that the party for whose benefit it was sent saw the body before burial. *Ibid.*

6. *Common-law Duty—Statutes of Another State—Evidence—Judicial Notice.*—An action against a telegraph company for mental anguish caused by its failure in its duty to deliver a telegram is founded on the common law, and does not require the aid of a contract to support it. Hence, as there is a presumption that, *prima facie*, the common law applicable to such cases is in force in other States, it is incumbent upon the party relying upon a statutory different rule of law applicable in another State to prove it, for the court will not take judicial notice thereof. *Ibid.*

7. *Death Message, Delay in Delivery of—Decomposition—Measure of Damages.*—In an action upon a message announcing a death, when the complaining party arrived in time to see the body, damages will not be awarded for injury to feelings caused by seeing the corpse in an advanced stage of decomposition as a natural consequence of a breach of duty by the telegraph company in not delivering the message more promptly. *Ibid.*

TELEGRAPH COMPANIES—*Continued.*

8. *Evidence.*—When telegrams are introduced in evidence from one party to the suit to the other, telegrams from the other party, received under circumstances clearly indicating they are replies, can be introduced by the same party without further proof, when they are relevant to the inquiry. *Edwards v. Erwin*, 429.

9. *Same—Harmless Error.*—When of a series of telegrams one is admitted in evidence as received in reply to those sent by the party offering them, and it does not appear to have any connection with the others and has no bearing upon the facts at issue, it is harmless error. *Ibid.*

10. *Office Hours—Waiver.*—When the agent of a telegraph company receives a message for transmission, and undertakes with the sender to deliver it at a time not within its reasonable office hours at its destination, the benefit of the office hours is waived. *Suttle v. Telegraph Co.*, 480.

11. *Proximate Cause — Notice of Importance of Message — Damages.*—In an action against a telegraph company for its wrongful failure to deliver a message to the wife of the sender informing her that he was in a railroad wreck, but not hurt, it was shown that in fact the sender was hurt in the wreck; that he informed the company's agent at the time the message was sent that he knew his wife would hear of the wreck and spend a miserable night; that the message was not delivered until the next morning, and the wife passed a night of mental anguish, having heard of the wreck of the train on which she expected her husband and not having been able to hear with certainty as to his condition, though she heard that he was hurt: *Held*, (1) the notice given to the agent at the time the message was filed for transmission was sufficient for a recovery of damages against the company for the mental anguish sustained that night by the wife; (2) that the negligence of the company was the proximate cause of the injury. *Ibid.*

TENANTS IN COMMON.

1. *Lands Sold — Purchase by Tenant — Debt of Ancestor — Evidence—Interest Acquired.*—Evidence that S. bought the land held by tenants in common by inheritance, which was sold to pay debts of the ancestor, for and in behalf of one of the tenants, and made deed to him therefor, is insufficient to establish that he thereby holds it in trust for the others or that the legal or equitable title thus acquired must inure to the joint benefit of them all, when there is no evidence of suppression of bids or that the sale was not fairly conducted. *Jackson v. Baird*, 29.

TENANTS IN COMMON—*Continued.*

2. *Same.*—One tenant in common in lands held by the cotenancy by inheritance may become the purchaser at the sale of the land to pay the debts of the common ancestor and hold all the land thus acquired in his own right. *Ibid.*

TENDER. See Bond Issues, 2.

TERMINATION OF TRUSTS. See Trusts and Trustees, 3.

TITLE. See Jurisdiction, 5; Deeds and Conveyances, 24, 25, 26, 27; Mortgagor and Mortgagee, 2, 3.

TORT. See Jurisdiction, 2.

TOWN COMMISSIONERS. See Constitutional Law, 1.

TRANSCRIPT, DOCKETING. See Appeal and Error, 16, 18.

TRESPASS. See Railroads, 1, 2, 3.

1. *Question of Ownership—Evidence.*—In an action for damages arising upon the alleged negligence of defendant, through which the timber, etc., upon plaintiff's lands, consisting of several tracts, was burned, it was admitted in open court that the plaintiff was the owner and in possession of the land upon which the trespass was alleged to have been committed: *Held,* it was competent upon cross-examination for defendant's counsel to ask the plaintiff, a witness in his own behalf, if a certain tract of the land was not owned by some one else at the time of the fire, as tending to show that he had sold it, and thereby impeach his estimate of the damage he had testified to on his direct examination. *Gay v. Railroad,* 336.

2. *Presumptions — Damages—Pleadings—Allegations Sufficient.*—From every action of trespass the law infers some damages, and an allegation that defendant did unlawfully, forcibly, etc., enter upon certain lands in plaintiff's possession and occupation is sufficient to sustain the action. *Brame v. Clark,* 364.

3. *Pleadings—Husband and Wife—Attempted Seduction—Damages, Aggravation of.*—Under an allegation of trespass, in a suit by the husband, coupled with averments that it was with the "unlawful, malicious, lascivious," etc., intent and purpose to seduce, debauch and carnally know the plaintiff's wife, and that defendant did then attempt to seduce and carnally know her, the jury may award exemplary damages to the husband, under pertinent evidence, in aggravation of the actual damages caused by the mere act of trespass. *Ibid.*

4. *Husband and Wife—Seduction Attempted—Damages, Right of Husband to Recover — Constitutional Law.* — The statutory

TRESPASS—*Continued.*

and constitutional enlargement of the property rights of the wife does not affect the rights of the husband, in an action of trespass upon his home, upon the wife's land, with the intent and attempt to seduce or carnally know her. *Ibid.*

5. *Personal Injury—Children—Invitation, Expressed or Implied—Pleadings—Demurrer.*—Owners in possession of lands are not liable to trespassers for injuries received from conditions arising from the lawful use thereof for manufacturing or other lawful purposes; and a complaint alleging that the electrical plant on defendant's premises was alluring or attractive to boys, and the plaintiff, a boy of thirteen years of age, was injured while going through an opening between two buildings on defendant's lands by falling into a well of hot water negligently covered over, used in the conduct of defendant's business, and there is no allegation that boys usually passed the place where the injury was occasioned or were in the habit of frequenting the defendant's premises on account of its attractiveness, or that invitation, expressed or implied, had been extended by defendant, the plaintiff was a trespasser, and defendant is not responsible for his act thereof, and a demurrer will be sustained. *Briscoe v. Lighting and Power Co.*, 396.

6. *Negligence — License — Explosives.*—One storing dynamite on his own premises for legitimate purposes, in boxes, with the word "Dynamite" written or printed on the box containing it, placed in a shanty with the door open and window torn out, thus affording ample opportunity to see the danger, owes no further duty to a person going upon the premises without either an express or implied license, and is not liable to him for damages caused by his companions shooting into the shanty and exploding the dynamite, not knowing it was there. *Fanning v. White*, 541.

7. *Same—Independent Acts.*—When one trespasses upon the premises of the owner of lands and shoots into a shanty in which the owner had rightfully placed dynamite, and thereby causes an explosion, which injures a third person, the act of shooting, being done by an independent, intelligent agency, was the cause of the injury, and the owner of the lands is not liable for damages. *Ibid.*

TRUSTS AND TRUSTEES. See Husband and Wife.

1. *Deeds and Conveyances—Husband and Wife—Tenant by the Curtesy — Wife's Land — Deed of Husband — Intent Presumed—Wife's Estoppel.*—A trustee for the wife, under a deed from the husband which was not executed by the wife,

conveyed certain lands to N. upon the same uses and trusts. The husband and wife separated during the year in which the deed was made. The land conveyed was by given boundaries, but the description contained these words: "including the lot given to the wife by her father (which is still retained by her)." The husband had an interest in his wife's land as tenant by the curtesy. The wife was not a party to the deed: *Held*, (1) if it be conceded that the lot spoken of as "retained" by the wife passed by the description, the law will presume that only such interest as the husband had therein was, or was intended by him to be, conveyed; (2) as to the wife, there was no estoppel created so as to pass her estate. *Featherston v. Merrimon*, 199.

2. *Deeds and Conveyances—Foreclosure Proceedings—Failure to Redeem—Equitable Remedies.*—Under a consent decree it was admitted that the vendee held the land in controversy in trust to pay an obligation to him of the vendor in a specified sum, and adjudged that the vendor have the amount of the rents and profits credited thereon, ascertained by a reference to be in a certain sum. The court thereupon adjudged that the land be sold by a commissioner, authorizing him to make title, and who, in pursuance thereof, made title to the said vendee: *Held*, (1) that the vendor was estopped from contending for a recovery as to new credits set up for waste, except such as were not conclusively settled by the judgment; (2) that by the consent decree the action virtually became one to foreclose a mortgage; (3) that there was no error in the order of the trial Judge that the land be sold and the equities administered upon the failure of the vendor to redeem within the time specified in the decree. *Bradburn v. Roberts*, 214.

3. *Termination of Trust Estate.*—H. sold lands to D., who gave him a mortgage thereon to secure balance of the purchase price. Thereafter he mortgaged the same land to O., who subsequently brought suit to foreclose. In the meanwhile H. foreclosed under the power of sale contained in his mortgage and made deed to B., and after the satisfaction of his debt, paid the balance to O. without objection from D., whereupon judgment was rendered against D. for the amount yet due O. after deducting this credit. Thereafter O., by agreement between himself and B., bought an interest in the land from B. In the absence of any fraud or collusion between B., the purchaser at the mortgage sale, and O., the holder of the second mortgage: *Held*, (1) all the rights, title and interest of the mortgagor and the second mortgagee in the land was extinguished by the sale under the first

TRUSTS AND TRUSTEES—*Continued.*

mortgage; (2) the general principle of law forbidding the mortgagee to acquire title in the trust estate against the mortgagor during the continuance of the trust has no application. *Dunn v. Oettinger*, 276.

4. *Same—Laches, Evidence of.*—When a mortgagor seeks to set aside a sale made in pursuance of a power given under a mortgage, upon the ground that the mortgagee bought in the trust estate during the continuance of the trust, and the record shows that he had had opportunities to set up the equity thus claimed in various other suits, it is at least suggestive of laches and inconsistent with his present action, though possibly not an estoppel of record. *Ibid.*

UNIFORMITY. See Constitutional Law, 3.

VALUABLE PAPERS. See Wills, 7.

VARIATIONS. See Pleadings, 16.

VENDOR AND VENDEE.

1. *Agricultural Lien—First Year's Crop—Lien for Second Year—Subrogation—Quære.*—Plaintiff had a valid agricultural lien on defendant's crop under a written instrument containing in addition a chattel mortgage on defendant's mule and cart. The remaining crop at the end of the year was sufficient to pay a balance still owing by defendant, and at defendant's request it was agreed that he should retain the remaining crop, together with the mule and cart, to enable him to make a crop for the ensuing year, the plaintiff to make advancements therefor in a certain amount, inclusive of that due for the year preceding: *Held*, it was competent for the parties to agree that the crop of defendant then on hand and the mule and cart to be used in making the crop for the second year should be considered as advancements for that year, so as to constitute a valid lien on the second year's crop for their payment. As to whether the party making the advancement would otherwise be remitted for his security to the original lien on taking the second security, *quære.* (*Lowdermilk v. Bostick*, 98 N. C., 299, cited and distinguished.) *Bargain House v. Watson*, 295.

2. *Administrator—Mortgagor and Mortgagee.*—Plaintiffs, in an action to enforce specific performance of a contract to convey lands, made by deceased and his wife, brought suit against the wife as executrix of her husband, and obtained judgment that the administratrix execute and deliver a deed to him upon payment of the purchase money on a specified day, and in default the lands be sold at public auction for

VENDOR AND VENDEE—*Continued.*

cash, etc., naming a commissioner; also, that the case be retained for further consideration of questions raised by the pleadings in regard to the disposition of the purchase money. The case was inadvertently dropped from the docket by the Clerk, and at a subsequent term reinstated, on defendant's motion, the Judge finding that the administratrix failed to advertise the land as directed, but had since then made a deed to plaintiff upon payment by him of purchase money: *Held*, (1) the judgment, in effect, was to declare the holders of the legal title trustees to secure the purchase money and pay remainder to plaintiff, and by the administratrix accepting the money, the same result would follow upon equitable principles, and her deed would be valid; (2) the decree of sale of the land as made by the court was a proper one, as the relation of vendor and vendee under such conditions is, for all practical purposes, that of mortgagor and mortgagee. *Jones v. Jones*, 358.

3. *Contracts—Breach of Warranty—"Opinion Evidence."*—In an action to recover the purchase price of a machine, the defense being a breach of warranty, it was competent for witnesses to testify as to their opinion on the question whether the machine was fitted for the work it was guaranteed to do, when the witnesses were qualified by training and experience to express an opinion that would aid the jury to a correct conclusion, and where this training and experience was acquired by the use and operation of machines of like kind and make, identical in principle, structure and operation; and though the witnesses had not had personal observation of the very machine which was the immediate subject of inquiry. *Tire Setter Co. v. Whitehurst*, 446.

VESTED INTEREST. See Wills, 6.

VOTE OF THE PEOPLE. See Constitutional Law, 5, 6, 7, 9, 17.

WAIVER.

1. *Insurance — Contract Induced by Fraud — Subsequent Payments.*—When it is established that an insurance company has induced the insured to take a policy of life insurance by false and fraudulent representations, causing him to believe he could get the amount paid in premiums, with interest, at the expiration of a five-year period, the insured, by then making demand and afterwards continuing to pay for another five-year period under like representations and conditions, does not waive his right of action. *Stroud v. Insurance Co.*, 54.

WAIVER—*Continued.*

2. *Insurance—Contracts—Torts—Justices of the Peace—Jurisdiction.*—When an insurance company has received premiums from the insured under a contract of insurance induced by false and fraudulent representations, the insured may waive the tort and sue for money had and received; and, an action therefor being *ex contractu*, the justice's jurisdiction is not limited to $50, as in action for tort. *Ibid.*

3. *Fire Insurance—Policies—Standard Form—Additional Insurance.*—The condition expressed in the statutory standard form of a fire insurance policy, that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy," etc., "unless such waiver, if any, shall be written upon or attached hereto," does not restrict the power of such officers, etc., to waive such condition, but establishes an invariable rule of evidence as to such waiver and renders parol evidence thereof inadmissible. *Black v. Insurance Co.*, 169.

4. *Contracts in Writing—Principal and Agent—Waiver by Parol—Burden of Proof.*—In order to establish a waiver, by parol, of the express terms of a written contract by an agent of one of the parties, the burden of proof is on the party seeking to establish it. *Medicine Co. v. Mizell*, 384.

5. *Telegraph Companies—Office Hours.*—When the agent of a telegraph company receives a message for transmission, and undertakes with the sender to deliver it at a time not within its reasonable office hours at its destination, the benefit of the office hours is waived. *Suttle v. Telegraph Co.*, 480.

6. *Penalty Statutes—Failure to Pay Claim—Accepting Payment for Damages—Suit for Penalty.*—The consignee, by accepting from the carrier the full amount claimed as damages to or loss of goods while in its possession, does not waive his right of action to recover the penalty for failure of the carrier to adjust and pay the amount within the time limited after claim has been filed, etc., under Revisal, sec. 2634. *Albritton v. Railroad*, 485.

WARRANTY, BREACH OF. See Contracts, 30.

WARRANTY, EXPRESS. See Contracts, 7.

WAREHOUSEMAN. See Carriers of Freight, 8.

WASTE. See Executors and Administrators, 4, 7.

WATER AND WATER COURSES.

1. *Drainage of Lands—Supplemental Proceedings—Motion in the Cause.*—When the rights and duties of adjoining landowners as to drainage in a certain canal have been determined under

WATER AND WATER COURSES—*Continued.*

the Drainage Act (now Revisal, ch. 88), and judgment entered, proceedings subsequently brought for the purpose of readjustment, owing to change of ownership and partition, etc., are in effect a motion in the cause, in which the judgment, unlike a final judgment, is not conclusive; and the cause can be brought forward from time to time, upon notice to the parties, and further decrees made to conform to the exigencies and changes which may arise. *Staton v. Staton*, 490.

2. *Drainage of Lands — Petition — Description — Pleadings — Amendments.*—A petition in proceedings brought for the purpose of readjusting the rights and duties of adjoining landowners in draining their lands into a certain canal is not uncertain because it does not restate the *termini* of the canal which sufficiently appear in the original proceedings; and, if otherwise, the petitioner should be allowed to amend. *Ibid.*

WILLS.

1. *Personal Property—Legacies—Residue of a Residue.*—The general rule of construction of a will of personal property, that a general residuary clause carries whatever is not otherwise legally disposed of, has no application in construing a bequest of a residue of a residue. *Battle v. Lewis*, 142.

2. *Conversion of Real Property—Lapsed Legacy—Residue of a Residue—Intestacy—Distribution.*—When an executor is directed to sell certain real estate which belonged to his testator and pay from the proceeds a sum certain to each of specified legatees, and, in the event of the prior death of a certain one of them, his share to go to a certain church; and, further, under the same item, should there by a surplus, it should go to the said church: *Held*, by the provision of the will the proceeds of the sale of the land will be deemed personalty, and, in the absence of a general residuary clause, a lapsed legacy of one named in this item and not therein provided for does not go to the church; for, as to this legacy, the testator died intestate, and it is subject to the general law of distribution. *Ibid.*

3. *Bequests Specific—Id Certum Est, etc.*—When a will bequeaths to named legatees a fixed sum each, which is to be paid, with another fixed amount elsewhere directed to be paid in the will, from the proceeds of sale by the executor of certain land, a bequest of the residue is specific, it being capable of being made certain. *Ibid.*

WILLS—*Continued.*

4. *Construction—Evidence of Intent.*—A testator devised that the proceeds of sale of certain lands were to be distributed in a certain sum each to specified legatees. In the event of the lapse of a legacy, by death, given to one of them, her brother, an old man, it was bequeathed to a certain church. Another of the legatees, her nephew, a young man, predeceased his testatrix without further provision having been made by her respecting his lapsed legacy. By the same item of the will the church was bequeathed the surplus, should there be any: *Held*, these facts were some evidence, though not conclusive, of the intention of the testator that the lapsed legacy of the nephew should not go to the church as the residuary legatee of the residue. *Ibid.*

5. *Interpretation—Ademption—Intent.*—In order to establish an ademption of a specific devise, there must be an alteration in the character of the subject-matter, made or authorized by the testator himself. Therefore, when there is a devise of certain lands by their known name, concerning which there was a claim under a contract to convey made by some third person, which in the lifetime of the testator had been unsuccessfully contested by suit, and after his death it had successfully been contested and the purchase price paid to the executors and held by them free from claim of debt of the testator, and it further appearing that the testator died in possession, believing he was the owner in fee, his intention will be construed as devising, not only the land itself, but all of his right, title or interest therein, and by the specific devise the proceeds of sale of the land will go to the devisee named. *Rue v. Connell*, 302.

6. *Interpretation — Remainders — Vested Interests—Child, etc., Living.*—Property was devised to a daughter, but "should she die without child," etc., then to J., L. and E. for life, and then over. J. and the daughter intermarried and had children, who did not survive their mother. At the death of the mother: *Held*, that J. could not take a fee simple, as no interest vested in the children; this, both by interpretation of the language of the will itself and the rule in Revisal, sec. 1581, providing that, unless it is otherwise clearly expressed in the will, the children, etc., must be alive at the death of the first taker for the interest to vest in them. *Staton v. Godard*, 434.

7. *Holographs, How Proven—Found Among Valuable Papers—Safe.*—When there is evidence tending to show that a paper-writing purporting to be the will of the deceased was altogether in his handwriting and signed by him, and that it was found in a drawer in his iron safe, where he kept notes he

WILLS—*Continued.*

had received for money loaned, with other papers, and that it was written on the envelope in which he had kept accident insurance policies, which therein were disposed of, it was not error for the trial Judge to instruct the jury that, if they found the facts accordingly, from the greater weight of the evidence, it would establish the validity of a holograph will under the terms of the statute, whether or not there was any other paper in the same drawer with this particular writing when found. *Harper v. Harper*, 453.

8. *Interpretation—Estate—Property Disposed of—Partial Intestacy.*—A holograph will, written on the back of an envelope containing policies of accident insurance, bequeathed the amount of the policies to the three daughters of testator. It was stated in the will that the son "has had his full share of mine and his mother's estate"; that if any of the children show a "reckless disposition to spend money, only a part of my estate be given them," etc.; that "personal property be disposed of," etc.; disposition was made of children, and their education was provided for, and persons named were requested "to be trustees for my children": *Held*, (1) that the statement that the son had been fully provided for excluded him from further participation; (2) that the expression, the "personal property be disposed of," meant its conversion into money, and evidenced the intent that the personal property was not the sole object of the will; (3) there is no intention indicated to restrict the will to either kind of property or of partial intestacy, or to restrict the operation of the will to the lapsed accident policies enclosed in the envelope upon which it was written. *Ibid.*

9. *Joinder of Action—Construction—Devisavit Vel Non.*—While it is unusual for the question of *devisavit vel non* and a prayer for the construction of a will to be united in the same action, yet when all the parties appear and request that the whole matter be determined, the question of jurisdiction does not arise, and in this case they were accordingly passed upon. *Ibid.*

10. *Executors and Administrators—Waste—Interpretation.*—When it is necessary to construe the will, in an action against the executors for waste, to determine the questions involved, the court will do so to that extent and for that purpose only. *In re Knowles*, 462.

WORDS AND PHRASES. See Deeds and Conveyances, 6; Executors and Administrators, 2.

WRONGFUL KILLING. See Executors and Administrators, 9.

YEAR'S SUPPORT. See Landlord and Tenant, 1.

This book must
not be taken
from the building